United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM
2:16-17965 Guillermo Alvarado **Chapter 7**

#1.00 Hearing
RE: [128] Motion to Abandon Debtor's Principal Residence:Supporting Memorandum & Declarations. Giovanni)

Docket 128

Tentative Ruling:

1/22/2019

The Court is prepared to deny the Motion on a ground not raised by the parties. To provide the parties an opportunity to respond to the Court's findings, a continued hearing on the Motion shall take place on **February 13, 2019, at 10:00 a.m.**

Pleadings Filed and Reviewed:

1) Notice of Motion and Motion of Debtors for Order Compelling Chapter 7 Trustee to Abandon Debtors' Principal Residence [Doc. No. 128] (the "Second Abandonment Motion")
   a) Declaration of Norma Balboa Regarding Service [Doc. No. 129]
   b) Notice of Hearing on Motion of Debtors for Order Compelling Chapter 7 Trustee to Abandon Debtor's Principal Residence [Doc. No. 131]
2) Chapter 7 Trustee's Opposition to Debtor's Second Motion to Compel Abandonment of Real Property [Doc. No. 130] (the "Opposition")
   a) Declaration of Trustee's Counsel in Support of Trustee's Opposition to Debtor's Second Motion to Compel Abandonment of Real Property [Doc. No. 134]
3) Reply to Chapter 7 Trustee's Opposition to Debtor's Second Motion to Compel Abandonment of Real Property [Doc. No. 133]

I. Facts and Summary of Pleadings

A. Procedural Background

Guillermo Alvarado (the "Debtor") commenced a voluntary Chapter 7 petition on June 15, 2016. Doc. No. 1. On August 8, 2018, the Debtor filed a motion seeking to compel the Chapter 7 Trustee (the "Trustee") to abandon the Debtor's principal residence, located at 16923 Royal Pines Lane, Canyon Country, CA 91387 (the

"Property"). Doc. No. 106 (the "First Abandonment Motion"). On September 6, 2018, the Court denied the First Abandonment Motion, without prejudice, based upon the Debtor's failure to properly set the motion for hearing. Doc. No. 117 (the "Denial Order"). Shortly after issuance of the Denial Order, the Debtor filed a *Notice of Hearing on Motion of Debtors for Order Compelling Chapter 7 Trustee to Abandon Debtor's Principal Residence* [Doc. No. 118] (the "Purported Notice"), but did not re-file the First Abandonment Motion. On September 10, 2018, the Court issued an order striking the Purported Notice from the record. Doc. No. 121 (the "Order Striking Purported Notice"). The Court found that the filing of the Purported Notice was procedurally improper for the following reasons:

> Pursuant to the Denial Order, the Motion has been denied without prejudice. As a result, the Debtor is required to file a new motion, and pay the required filing fee, if he wishes to obtain a hearing upon the relief requested. A Motion that has been denied cannot be resuscitated by the filing of a document such as the Purported Notice.

Order Striking Purported Notice at ¶1.

On December 18, 2018, the Debtor filed a second motion seeking to compel the Trustee to abandon the Property. Doc. No. 128 (the "Second Abandonment Motion"). The Trustee objects to the Second Abandonment Motion.

B. The Trustee's Related Avoidance Action

On October 18, 2018, the Trustee commenced an action to avoid the post-petition transfer of the Property from the Debtor to Victor Marquez and David Marquez. On January 17, 2019, the Court entered default judgment and avoided the transfer. Adv. Doc. No. 23 (the "Marquez Judgment"). Among other things, the Court ordered that the Grant Deed transferring the Property from the Debtor to Victor and David Marquez (the "Marquez Grant Deed") "is automatically preserved for the benefit of the estate pursuant to 11 U.S.C. § 551 ahead of the Debtor's claimed homestead exemption." Marquez Judgment at 2.

C. Summary of Papers Filed in Connection with the Second Abandonment Motion

By the Second Abandonment Motion, the Debtor seeks an order compelling the Trustee to abandon the Property. The Trustee opposes the Motion. The Debtor and the Trustee dispute whether there is any equity in the Property to be administered for the benefit of creditors.

The gravamen of the dispute is whether the Property is encumbered by a Deed of Trust in favor of Victor Marquez (the "Marquez Deed of Trust"). The Marquez Deed of Trust is different from the Marquez Grant Deed avoided by the Trustee. According to the Debtor, the Marquez Deed of Trust was recorded on October 22, 2015, for the purpose of securing a $250,000 loan that Victor Marquez made to the Debtor on October 15, 2015. A copy of the Marquez Deed of Trust is attached as an exhibit to the Second Abandonment Motion. Doc. No. 128 at Ex. 4.

The Trustee disputes the existence of the Marquez Deed of Trust. The Trustee points to a title report, prepared by Priority Title, which did not identify the Marquez Deed of Trust as an encumbrance against the Property.

II. Findings and Conclusions

As a preliminary matter, the Court first addresses a procedural irregularity regarding the manner in which the Second Abandonment Motion has been briefed. The Trustee's Opposition to the Motion contained no argument with respect to the existence of the Marquez Deed of Trust. The Trustee's contention that the Marquez Deed of Trust does not encumber the Property was first raised two days subsequent to the filing of the Debtors' Reply, in a document captioned *Declaration of Trustee's Counsel in Support of Trustee's Opposition to Debtor's Second Motion to Compel Abandonment of Real Property* [Doc. No. 134] (the "Declaration"). Because the Declaration was not filed concurrently with the Trustee's Opposition and raises new arguments in response to the Reply, the Court construes the Declaration as an unauthorized Sur-Reply.

The Debtor has not had an opportunity to respond to the Trustee's challenge to the existence of the Marquez Deed of Trust. For this reason, the Court does not consider the Trustee's arguments regarding the validity of the Marquez Deed of Trust. However, as more fully explained below, the Court is prepared to find that regardless of the validity of the Marquez Deed of Trust, denial of the Second Abandonment Motion is appropriate because there is equity in the Property that the Trustee can administer for the benefit of creditors. Because this finding is based upon a ground not raised by the Trustee, the Court will hold a continued hearing on the Second Abandonment Motion to provide the Debtor an opportunity respond.

Assuming without deciding that the Marquez Deed of Trust was recorded against the Property on October 22, 2015, the Court is prepared to find that as a result of subsequent events, the Marquez Deed of Trust no longer encumbers the Property. The reason is that on September 13, 2017, the Debtor transferred the Property to Victor

10:00 AM

CONT... Guillermo Alvarado **Chapter 7**

and David Marquez by way of the Marquez Grant Deed. Under the doctrine of merger, whenever the same person holds a greater and lesser estate in the same parcel of real property, the lesser estate merges into the greater and is extinguished. *Kolodge v. Boyd*, 88 Cal. App. 4th 349 (2001). Subsequent to the transfer effectuated by the Marquez Grant Deed, Victor Marquez obtained a fee simple interest in the Property (with David Marquez holding an interest as a joint tenant). Victor Marquez's lesser interest (the security interest established by the Marquez Deed of Trust) merged with his greater interest (the fee simple interest resulting from the Marquez Grant Deed), and the lesser interest ceased to exist. Consequently, when the Trustee subsequently avoided the transfer effectuated by the Marquez Grant Deed, the Property was no longer encumbered by the Marquez Deed of Trust, which had been extinguished under the doctrine of merger.

The Debtor asserts that the Property is worth $930,000; the Trustee contends that the Property is worth in excess of $989,000. The Property is encumbered by a Deed of Trust in favor of Wells Fargo in the approximate amount of $676,000. Even under the Debtor's lower valuation, the Property has equity that the Trustee can administer for the benefit of creditors if it is not encumbered by the Marquez Deed of Trust.

A continued hearing on the Second Abandonment Motion shall be held on **February 13, 2019, at 10:00 a.m.** The Debtor and the Trustee shall submit briefs responding to the preliminary findings of the Court set forth herein by no later than **February 6, 2019**. The briefs shall also address whether the Marquez Deed of Trust encumbers the Property if the Court determines that it was not extinguished under the doctrine of merger. That is, was the Marquez Deed of Trust validly recorded on October 15, 2015, and do the records of the Los Angeles County Recorder continue to reflect the Marquez Deed of Trust as an encumbrance against the Property? (It is possible that a title report, such as that obtained by the Trustee, may not detect all encumbrances.) Absent further order of the Court, no further briefing on the Second Abandonment Motion will be accepted.

The Court will prepare and enter an order setting the continued hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Jessica Vogel or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic

10:00 AM

CONT... Guillermo Alvarado **Chapter 7**

appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Guillermo Alvarado — Represented By Giovanni Orantes

Trustee(s):

Rosendo Gonzalez (TR) — Represented By Toan B Chung

10:00 AM
2:16-19483 Laura Denise Banuelos and Michael Angelo Banuelos **Chapter 7**

#2.00 HearingRE: [68] Motion to Disallow Claims - Amended Objection to Claim 9-1 of Joseph Yeh; Memo of Points and Authorities; and Declaration of Travis Terry in Support Thereof (with proof of service) (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 9-1) (Sarenas, Lovee)

Docket 68

Tentative Ruling:

1/22/2019

For the reasons set forth below, the Claim Objection is SUSTAINED and Claim 9 is reclassified as a general unsecured claim in the amount of $1,148.64.

Pleadings Filed and Reviewed

1. Amended Objection to Claim 9-1 of Joseph Yeh [Doc. No. 68] (the "Claim Objection")
2. Amended Notice of Objection to Claim [Doc. No. 69]
3. As of the preparation of this tentative ruling, no opposition is on file

I. Facts and Summary of Pleadings

Laura and Michael Banuelos (the "Debtors") filed this voluntary chapter 7 case on July 18, 2016 (the "Petition Date"). The deadline to file timely proofs of claim was April 17, 2017.

On February 8, 2017, Joseph Yeh ("Claimant") filed Proof of Claim Number 9-1 ("Claim 9") asserting a priority unsecured claim of $1,148.64 pursuant to § 507(a)(4) for "services performed." In support of Claim 9, Claimant attached copies of a hand-written note that states "Joseph, please hold onto both checks until we have the long. Leo will let you know. Thank you, Laura," and two checks from Newtech Resources, Inc. ("Newtech") to Mr. Yeh, totaling $1,148.64. One of the checks, dated January 1, 2016 (Check No. 1051), is for the sum of $765.76 and the memo line states "12/19/15 - 1/1/16" ("Check One"). The other check, dated January 18, 2016 (Check No. 1052), is difficult to read, but appears to be for the sum of $382.88 and the memo

line states "1-2 – 1/16" ("Check Two," and together with Check One, the "Checks").

The chapter 7 trustee, Peter Mastan (the "Trustee"), acting through counsel objects to Claim 9 on the basis that the claim is improperly classified as a priority wage claim under § 507(a). First, the Trustee asserts that Mr. Yeh has not provided evidence to show that his debt arises from wages, as is required by § 507(a)(4), because the Checks do not explicitly state that they were for the payment of Mr. Yeh's wages and Mr. Yeh has not shown that the debt is personally owed by the Debtors, rather than Newtech.

Second, the Trustee states that in order to qualify as a priority claim under § 507(a)(4), the services must have been performed within six months prior to the Petition Date, but notes that the Checks were not written during the requisite priority period and do not indicate that they were for services performed within the priority period. Therefore, the Trustee argues that even if the Checks were for the payment of wages, Mr. Yeh has not demonstrated that he is entitled to a priority claim under § 507(a)(4).

The Trustee states that he reached out to Mr. Yeh on at least three occasions to request that Mr. Yeh amend or withdraw his proof of claim for the reasons stated above but has not received any response. Accordingly, the Trustee requests that the Court enter an order sustaining the Claim Objection and reclassifying Claim 9 as a general unsecured claim.

As of the preparation of this tentative ruling, no opposition is on file.

II. Findings of Fact and Conclusions of Law

A proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes *prima facie* evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f). "The filing of an objection to a proof of claim 'creates a dispute which is a contested matter' within the meaning of Bankruptcy Rule 9014 and must be resolved after notice and opportunity for hearing upon a motion for relief." *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000) (citing Adv. Comm. Notes to Fed. R. Bankr. P. 9014). Upon objection, the proof of claim provides "some evidence as to its validity and amount" and carries over

a "mere formal objection." *Id.* The objector must produce sufficient evidence "tending to defeat the claim by probative force equal to that of the allegations in the proofs of claim themselves." *Id.* (quoting *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir.1991)). The claim itself can be used as evidence to rebut the prima facie validity where the objector's contention is that the claim is facially defective and insufficient as a matter of law. *See In re Circle J Dairy, Inc.*, 112 B.R. 297, 299–301 (Bankr. W.D. Ark. 1989). The claimant must "prove the validity of the claim by a preponderance of the evidence. The ultimate burden of persuasion remains at all times upon the claimant." *Id.*

The Court finds that Claim 9 was filed in accordance with Bankruptcy Rule 3001 and is therefore entitled to a *prima facie* presumption of validity. However, the Trustee has satisfied his burden of overcoming that presumption by filing an objection asserting that the evidence does not support a finding that the alleged debt qualifies as a priority claim under § 507(a)(4).

Section 507(a)(4) designates "wages, salaries, or commissions, including vacation, severance, and sick leave pay" that are earned by an individual "within 180 days before the date of the filing of the petition" as a fourth-priority claim.

As the Trustee highlights, Mr. Yeh has not responded with evidence establishing that his debt arises from wages, salaries or commissions. Additionally, by this Court's calculation, 180-days prior to the Petition Date is January 20, 2016. However, the Checks purport to be payment for services performed during "12/19/15 – 1/1/16" and "1-2[-16] – 1/16[/16]." Therefore, the dates listed on the memo lines on the Checks indicate that the services were performed earlier than January 20, 2016, and do not qualify for priority treatment under § 507(a)(4).

Additionally, pursuant to LBR 9013-1(h), LBR 3007-1(b)(3)(B), and LBR 3007-1(b)(6), the Court treats Claimant's failure to file a response to the Claim Objection as consent to granting the relief the Trustee seeks.

III. Conclusion

For the reasons set forth above, the Claim Objection is SUSTAINED and Claim 9

10:00 AM

CONT... Laura Denise Banuelos and Michael Angelo Banuelos **Chapter 7**

is reclassified as a general unsecured claim in the amount of $1,148.64.

The Trustee is directed to lodge a conforming proposed order, incorporating the tentative ruling by reference, within 7 days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Jessica Vogel at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Laura Denise Banuelos	Represented By Jeffrey B Smith

Joint Debtor(s):

Michael Angelo Banuelos	Represented By Jeffrey B Smith

Trustee(s):

Peter J Mastan (TR)	Represented By Amy L Goldman Lovee D Sarenas

10:00 AM
2:17-15115 John Martin Kennedy **Chapter 7**
Adv#: 2:17-01377 Campos v. Kennedy, MD

#3.00 Hearing
RE: [31] Motion For partial Summary Judgment

Docket 31

Tentative Ruling:

1/22/2019

The Motion is GRANTED for the reasons set forth below.

Pleadings Filed and Reviewed:
1) Notice of Motion and Motion for Partial Summary Judgment [Doc. No. 31] (the "Motion")
2) Limited Opposition to Motion for Partial Summary Judgment [Doc. No. 36]
3) Reply in Support of Partial Motion for Summary Judgment [Doc. No. 39]

I. Facts and Summary of Pleadings

Plaintiff has obtained final judgment in the State Court (the "State Court Judgment") against Defendant, awarding Plaintiff damages of $225,000 for sexual battery (Cal. Civ. Code § 1798.5), gender violence (Cal. Civ. Code § 52.4), and violation of the Ralph Civil Rights Act (Cal. Civ. Code § 57.7). The portion of the State Court Judgment awarding Plaintiff attorneys' fees in the amount of approximately $2.5 million is not yet final. However, the State Court Judgment's award of costs in the amount of $84,090.34 is final.

Plaintiff seeks partial summary adjudication with respect to her claim that the portion of the State Court Judgment that is final is excepted from Defendant's discharge, pursuant to § 523(a)(6). Plaintiff asserts that Defendant is precluded from contesting the dischargeability of the indebtedness established by the State Court Judgment.

Defendant does not contest the non-dischargeability of the aspects of the State Court Judgment that are final (the award of damages of $225,000 and costs of $84,090.34). However, Defendant reserves all rights regarding the dischargeability of any award of attorneys' fees.

Plaintiff asserts that in the event the award of attorneys' fees becomes final, such fees will also be non-dischargeable. Plaintiff requests that if and when the award of attorneys' fees becomes final, she be permitted to commence collection efforts.

II. Findings and Conclusions

A. The Court Does Not Rule on the Dischargeability of the Award of Attorneys' Fees

It is not proper for the Court to decide, at this time, whether any attorneys' fees that may be awarded to Plaintiff are non-dischargeable. First, the Motion sought partial summary adjudication only with respect to the aspects of the State Court Judgment that are now final (the award of damages and costs). To rule upon the dischargeability of the attorneys' fees would go beyond the scope of the relief requested in the Motion and would violate Defendant's due process rights.

Second, the pending appeal of the award of attorneys' fees means that under California law, the fee aspect of the State Court Judgment is not final for issue preclusion purposes. *See Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1174, 102 Cal. Rptr. 2d 770, 774 (2000) ("Unlike the federal rule and that of several states, in California the rule is that the finality required to invoke the preclusive bar of res judicata is not achieved until an appeal from the trial court judgment has been exhausted or the time to appeal has expired."). Because issue preclusion applies only in the context of a final judgment, it would be premature for the Court to find that Defendant is precluded from contesting the dischargeability of the fee aspect of the State Court Judgment.

B. Defendant is Precluded from Contesting the Dischargeability of the Aspects of the State Court Judgment that are Final

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Civil Rule 56 (made applicable to these proceedings by Bankruptcy Rule 7056). The moving party has the burden of establishing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is 'material' only if it might affect the outcome of the case[.]" *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th

Cir. 2014). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The court is "required to view all facts and draw all reasonable inferences in favor of the nonmoving party" when reviewing the Motion. *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004).

To determine the preclusive effect of an existing state court judgment, the "bankruptcy court must apply the forum state's law of issue preclusion." *Plyam v. Precision Development, LLC (In re Plyam)*, 530 B.R. 452, 462 (9th Cir. BAP 2015). California preclusion law requires that:

1) The issue sought to be precluded from relitigation is identical to that decided in a former proceeding;
2) The issue was actually litigated in the former proceeding;
3) The issue was necessarily decided in the former proceeding;
4) The decision in the former proceeding is final and on the merits; and
5) The party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding.

Lucido v. Super. Ct., 795 P.2d 1223, 1225 (Cal. 1990).

Even if all five elements are satisfied, preclusion is appropriate "only if application of preclusion furthers the public policies underlying the doctrine." *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001) (citing *Lucido v. Super. Ct.*, 795 P.2d at 1225). In California, the public policies supporting preclusion are "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." *Lucido*, 795 P.2d at 1227.

1. The Five Elements Supporting Issue Preclusion Are Satisfied

Element 1: The Issues Are Identical

"Section 523(a)(6) excepts from discharge debts arising from a debtor's 'willful and malicious' injury to another person or to the property of another. The 'willful' and "malicious' requirements are conjunctive and subject to separate analysis." *Plyam v. Precision Development, LLC (In re Plyam)*, 530 B.R. 456, 463 (9th Cir. B.A.P. 2015) (internal citations omitted).

An injury is "willful" when "a debtor harbors 'either subjective intent to harm, or a

subjective belief that harm is substantially certain.' The injury must be deliberate or intentional, 'not merely a deliberate or intentional act that leads to injury.'" *Id.* at 463 (internal citations omitted). When determining intent, there is a presumption that the debtor knows the natural consequences of his actions. *Ormsby v. First Am. Title Co. of Nevada (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). An injury is "malicious" if it "involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146–47 (9th Cir. 2002) (internal citations omitted). "Within the plain meaning of this definition, it is the wrongful act that must be committed intentionally rather than the injury itself." *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 (9th Cir. 2005).

Here, the State Court Judgment in favor of Plaintiff finds that Defendant committed sexual battery, committed gender violence, and violated the Ralph Civil Rights Act (the "Ralph Act"). The State Court provided the jury the following instructions regarding Plaintiff's sexual battery cause of action:

> [Plaintiff] Ms. Campos claims that [Defendant] Dr. Kennedy committed a sexual battery. To establish this claim, Ms. Campos must prove the following:
> 1) That Dr. Kennedy intended to cause a harmful or offensive contact with Ms. Campos's vagina, buttocks or breast, and a sexually offensive contact with Ms. Campos resulted, either directly or indirectly; and
> 2) That Ms. Campos did not consent to the touching; and
> 3) That Ms. Campos was harmed or offended by Dr. Kennedy's conduct.
>
> "Offensive contact" means contact that offends a reasonable sense of personal dignity.

The State Court provided the jury the following instructions regarding Plaintiff's gender violence cause of action:

> [Plaintiff] Ms. Campos claims that [Defendant] Dr. Kennedy committed an act of gender violence against her. Gender violence is a form of sex discrimination.
>
> To establish this claim, Ms. Campos must prove either of the following:
>
> (1) That Dr. Kennedy committed a battery against Ms. Campos in part based on the gender of Ms. Campos.
>
> OR

(2) That Dr. Kennedy's conduct on April 10, 2013, constituted a physical intrusion or physical invasion of a sexual nature under coercive conditions.

The State Court provided the jury the following instructions regarding Plaintiff's cause of action under the Ralph Act:

> [Plaintiff] Ms. Campos claims that [Defendant] Dr. Kennedy committed an act of violence against her because of her sex. To establish this claim, Ms. Campos must prove all of the following:
> 1) That Dr. Kennedy committed a violent act against Ms. Campos;
> 2) That a substantial motivating reason for Dr. Kennedy's conduct was Ms. Campos's sex;
> 3) That Ms. Campos was harmed; and
> 4) That Dr. Kennedy's conduct was a substantial factor in causing Ms. Campos's harm.

As a result of the jury's findings that Defendant committed sexual battery, committed gender violence, and violated the Ralph Act, Defendant is precluded from contesting that he committed "willful and malicious" injury within the meaning of § 523(a)(6). The jury's findings establish that Defendant subjected Plaintiff to unwanted sexual contact; that Defendant did so deliberately; and that Plaintiff's gender was a substantial factor motivating Defendant's act of violence. This is precisely the type of "willful and malicious" injury that § 523(a)(6) was enacted to address.

Elements 2–3: The Issues Were Actually Litigated and Necessarily Decided

There is no dispute that the State Court Judgment was entered after a jury trial during which Defendant had the opportunity to defend himself. The Court finds that the issues were actually litigated and necessarily decided.

Element 4: The State Court Judgment is Final and on the Merits

There is no dispute that the portion of the State Court Judgment awarding costs and damages is final. Only the aspect of the judgment pertaining to attorneys' fees is subject to appeal. This element is satisfied.

Element 5: The Party Against Whom Preclusion is Sought is the Same as the Party to the State Court Proceeding

There is no dispute that Dr. Kennedy, the Defendant in the State Court Action, is the same person who is the Defendant in this action.

2. Public Policy Supports Preclusion

Having found that all five elements supporting issue preclusion have been established, the Court must also find that public policy supports applying California preclusion law. Such a finding is appropriate here. Applying preclusion law preserves the integrity of the judicial system by giving full effect to judgments that have been obtained after both parties were afforded full opportunity to litigate the matter. Preclusion promotes judicial economy by obviating the need for a duplicative and unnecessary trial. The avoidance of an unnecessary trial promotes the public policy against vexatious litigation.

C. Plaintiff is Entitled to Final Judgment with Respect to the Non-Dischargeability of the State Court Judgment's Award of Damages and Costs

Pursuant to Civil Rule 52(b), the Court finds that there is no just reason to delay entry of final judgment with respect to the non-dischargeability of the State Court Judgment's award of damages and costs.

D. Future Proceedings

Adjudication of the dischargeability of the fee portion of the State Court Judgment will occur once that aspect of the judgment becomes final. A Status Conference shall take place on **May 14, 2019, at 10:00 a.m.** By no later than fourteen days prior to the hearing, the parties shall submit a Joint Status Report, which shall discuss the status of Defendant's appeal of the award of attorneys' fees.

III. Conclusion

Based upon the foregoing, the Motion is GRANTED. Within seven days of the hearing, Plaintiff shall submit a (1) proposed order granting the Motion and (2) a proposed judgment. (Pursuant to the separate document rule, set forth in Civil Rule 58, both a proposed order and a proposed judgment are required.)

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Jessica Vogel or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should

10:00 AM

CONT... John Martin Kennedy **Chapter 7**

an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

John Martin Kennedy	Represented By Jeffrey S Shinbrot

Defendant(s):

John M. Kennedy MD	Represented By Jeffrey S Shinbrot

Plaintiff(s):

Yunuen Campos	Represented By Robert S Lampl Lauren A Dean Jeffrey S Shinbrot

Trustee(s):

David M Goodrich (TR)	Pro Se

10:00 AM
2:17-18805 ROBERT MARK CARPENTER **Chapter 7**
Adv#: 2:17-01512 Rosenberg et al v. CARPENTER

#4.00 Show Cause Hearing
RE: [44] **Order (1) Requiring Plaintiff To Show Cause Why This Action Should Not Be Dismissed For Failure To Prosecute**

FR. 12-12-18

Docket 1

Tentative Ruling:

1/22/2019

For the reasons set forth below, the OSC is discharged and the Motion is DENIED in its entirety.

Pleadings Filed and Reviewed

1. Complaint to Determine Dischargeability of Debt [11 U.S.C. § 523(a)(4)] [Adv. Doc. No. 1] (the "Complaint")
2. Scheduling Order [Doc. No. 15]
3. Plaintiffs' Motion for Summary Judgment [Adv. Doc. No. 31] (the "MSJ" or "Motion")
   a. Plaintiffs' Separate Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment [Adv. Doc. No. 32]
   b. Declaration of Fred Rosenberg in Support of Motion for Summary Judgment [Adv. Doc. No. 33]
   c. Plaintiffs' Request for Judicial Notice in Support of Motion for Summary Judgment [Adv. Doc. No. 34] ("Plaintiffs' RFJN")
   d. Notice of Hearing on Motion for Summary Judgment [Adv. Doc. No. 35]
4. Defendant's Separate Statement of Uncontroverted Facts and Conclusions of Law in Opposition to Motion for Summary Judgment [Adv. Doc. No. 38]

10:00 AM

CONT... ROBERT MARK CARPENTER **Chapter 7**

a. Defendant's Request for Judicial Notice in Opposition to Motion for Summary Judgment [Adv. Doc. No. 39]
b. Declaration of Robert Carpenter in Opposition to Motion for Summary Judgment [Adv. Doc. No. 40]

5. October 2, 2018 Ruling [Doc. No. 41] (the "October 2, 2018 Ruling")
6. Declaration of Robert Carpenter in Opposition to Motion for Summary Judgment: Supplemental Brief [Doc. No. 42]
7. Supplemental Request for Judicial Notice in Opposition to Motion for Summary Judgment [Doc. No. 43]
8. Order (1) Requiring Plaintiff to Show Cause Why This Action Should Not be Dismissed for Failure to Prosecute and (2) Vacating November 6, 2018 Continued Hearing on Plaintiffs' Motion for Summary Judgment [Doc. No. 44] (the "OSC")
9. November 6, 2018 Ruling [Doc. No. 46] (the "November 6, 2018 Ruling")
10. Declaration of Robert Carpenter Re: (1) Order Requiring Plaintiff to Show Cause For Failure to Show Cause Why This Action Should Not be Dismissed for Failure to Prosecute and (2) Vacating November 6, 2018 Continued Hearing on Plaintiffs' Motion for Summary Judgment [Doc. No. 48]
11. Declaration of Leonard Pena Re: Court's Order to Show Cause [Doc. No. 49]
12. Order Continuing Hearing on Order to Show Cause From December 12, 2018, at 10:00 A.M. to January 23, 2019 at 10:00 A.M. [Doc. No. 50]
13. Plaintiff's Supplemental Brief in Support of Motion for Summary Judgment [Doc. No. 52] (the "Supplemental Brief")
14. Declaration of Robert Carpenter in Opposition to Motion for Summary Judgment: Supplemental Brief [Doc. No. 53] (the "Supplemental Opposition")
15. Plaintiffs' Reply to Defendant's Opposition to Supplemental Brief in Support of Motion for Summary Judgment [Doc. No. 54] (the "Supplemental Reply")

I. Facts and Summary of Pleadings

This is a continued hearing on the Court's Order (1) Requiring Plaintiff to Show Cause Why This Action Should Not be Dismissed for Failure to Prosecute and (2) Vacating November 6, 2018 Continued Hearing on Plaintiffs' Motion for Summary Judgment [Doc. No. 44] (the "OSC"). In advance of an October 2, 2018 hearing on Fred Rosenberg ("Mr. Rosenberg") and Friendgiftr, Inc., a Delaware corporation's ("Friendgiftr," and together with Mr. Rosenberg, the "Plaintiffs") Motion for Summary Judgment against Defendant Robert Mark Carpenter ("Mr. Carpenter" or

10:00 AM

CONT... ROBERT MARK CARPENTER **Chapter 7**

"Defendant," and together with the Plaintiffs, the "Parties") on their claim under 11 U.S.C. § 523(a)(4) (the "Motion"), this Court issued a tentative ruling detailing the procedural history of this case and providing a summary of relevant pleadings [Doc. No. 41] (the "October 2, 2018 Ruling").

As set forth in more detail in the October 2, 2018 Ruling, the Court continued the matter for further briefing on the issues of: (1) whether an express or statutory trust existed; and (2) whether Defendant was acting in a fiduciary capacity within the narrow meaning of § 523(a)(4).

On November 5, 2018, this Court entered an *Order (1) Requiring Plaintiff to Show Cause Why This Action Should Not be Dismissed for Failure to Prosecute and (2) Vacating November 6, 2018 Continued Hearing on Plaintiffs' Motion for Summary Judgment* [Doc. No. 44] (the "OSC") after finding that Plaintiffs had failed to timely file supplemental briefing by the date set forth in the October 2, 2018 Ruling. On November 28, 2018, Plaintiffs and Defendant submitted declarations responding to the Court's OSC [Doc. No. 48 and 49]. Based upon this Court's review of those pleadings, the Court entered an *Order Continuing Hearing on Order to Show Cause From December 12, 2018, at 10:00 A.M. to January 23, 2019 at 10:00 A.M.* [Doc. No. 50].

On January 2, 2019, Plaintiffs filed a timely supplemental brief [Doc. No. 52] (the "Supplemental Brief"). Plaintiffs make two additional arguments in support of their contention that an express trust existed within the meaning of § 523(a)(4). Plaintiffs argue for the first time that Delaware, rather than California, law applies in determining whether the requisite trust relationship existed and whether there was a fiduciary relationship between Plaintiffs and the Defendant within the meaning of § 523(a)(4). In support of this argument, Plaintiffs cite *Matter of Reading Co.,* 711 F.2d 509, 517 (3d. Cir. 1983), but do not include any further analysis or authority on this point.

Next, applying California law, Plaintiffs contend that an "Agreement" dated May 5, 2009 between the Parties created an express trust because it described the nature, extent and restrictions of Plaintiffs' investment [Supplemental Brief, Ex. 1] (the "Agreement"). Therefore, Plaintiffs conclude that by the terms of the Agreement, the Defendant had a fiduciary duty to protect the investment funds of Friendgiftr and use

them only as described in the Agreement. Plaintiffs state that the LASC has already found that Defendant used the investment monies for expenses that were not authorized by the Agreement. Accordingly, Plaintiffs submit that they are entitled to summary adjudication on their § 523(a)(4) claim.

In the alternative, Plaintiffs request leave to amend their Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure to include a claim for embezzlement under § 523(a)(4). Plaintiffs state that their original attorney drafted the Complaint but, apparently believing Plaintiffs did not have a viable claim for embezzlement, did not include that claim in the Complaint. However, with the advice of new counsel, Plaintiffs now believe that the LASC's findings support a claim for embezzlement against the Defendant.

On January 8, 2019, Defendant filed a timely supplemental opposition [Doc. No. 53] (the "Supplemental Opposition"). Among other things, Defendant raises a number of issues with respect to the authenticity and validity of the Agreement (¶¶ 5, 6), the amount of damages Plaintiffs seek (¶ 7), contends that California law applies based on Defendant's assertion that Friendgiftr was a California corporation during his entire tenure (¶¶ 8-10), opposes Plaintiffs' request for leave to amend and denies Plaintiffs' assertion that he would be liable under a theory of embezzlement (¶12). Defendant also raises a number of arguments unrelated to the issues presently before this Court which the Court will not summarize.

On January 16, 2019, Plaintiffs filed a timely supplemental reply [Doc. No. 54] (the "Supplemental Reply"). Plaintiffs respond to Defendant's contention that Friendgiftr is a California corporation by attaching a Certificate of Merger reflecting a merger between the California corporation and the Delaware corporation on November 23, 2010. Supplemental Reply, Ex. 2. Plaintiffs reiterate their contention that because Friendgiftr is currently a Delaware corporation, the Court should look to Delaware corporate law in determining whether the Agreement created an express trust. Plaintiffs contend that Defendant's Supplemental Opposition does not deny that Defendant owed certain fiduciary duties or that the Agreement created an express trust. Therefore, Plaintiffs request that the Court grant their motion and enter judgment in their favor.

II. Findings of Fact and Conclusions of Law

A. The OSC is Discharged

In view of Plaintiffs' timely submission of the Supplemental Briefing described above, the Court's Order to Show Cause [Doc. No. 44] is discharged.

B. Plaintiffs Have Not Established That An Express or Technical Trust Existed or That Defendant Was Acting in a Fiduciary Capacity Under Applicable Law

The Court's October 2, 2018 Ruling contains a summary of applicable law with respect to a motion for summary judgment and application of collateral estoppel and, accordingly, will not be repeated here.

Section 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4). To prevail on a nondischargeability claim under § 523(a)(4) the plaintiff must prove: "1) an express trust existed, 2) the debt was caused by fraud or defalcation, and 3) the debtor acted as a fiduciary to the creditor at the time the debt was created." *Mele v. Mele (In re Mele)*, 501 B.R. 357, 363 (B.A.P. 9th Cir. 2013) (quoting *Otto v. Niles*, 106 F.3d 1456, 1459 (9th Cir. 1997)). Plaintiff must show "not only the debtor's fraud or defalcation, but also that the debtor was acting in a fiduciary capacity when the debtor committed the fraud or defalcation." *Honkanen v. Hopper (In re Honkanen)*, 446 B.R. 373, 378 (B.A.P. 9th Cir. 2011) (citations omitted).

"Although federal law governs the determination of whether a person or entity is a 'fiduciary,' courts considering dischargeability under § 523(a)(4) have looked to state law to evaluate the presence of a technical trust relationship barring the discharge of a debt under § 523(a)(4)." *Tri Supply & Equip., Inc. v. Brady (In re Brady)*, 458 B.R. 814, 820 (Bankr. D. Del. 2011); *see also Crowe v. Moran (In re Moran)*, 413 B.R. 168, 185 (Bankr. D. Del. 2009). As the Bankruptcy Court explained in *Moran*:

> The qualification that the debtor be acting in a fiduciary capacity has consistently, since its appearance in the Act of 1841, been limited in its application to what may be described as technical or express trusts, and not to trusts *ex maleficio* that may be imposed because of the very act

> of wrongdoing out of which the contested debt arose. Thus, an exception to discharge cannot be based upon a constructive or implied trust. *The Trust must have existed prior to the wrongdoing from which the debt arose.*
>
> Although federal law governs the determination of whether a person or entity is a 'fiduciary,' courts have found that the existence of a state statute or common law doctrine imposing trust-like obligations on a party may, at least in some circumstances, be sufficient to create a technical trust relationship that bars the discharge of a debt under section 523(a)(4). For purposes of section 523(a)(4), the applicable state law creating a fiduciary relationship must clearly outline the fiduciary duties and identify the trust property; if state law does not clearly and expressly impose trust-like obligations on a party, the court should not assume that such duties exist and should not find that there was a fiduciary relationship.

In re Moran, 413 B.R. at 185-86 (internal citations omitted) (emphasis added).

In their Supplemental Briefing Plaintiffs now assert that because Friendgiftr is a Delaware corporation, this Court must apply Delaware law to determine whether an express or technical trust existed. Because Defendant has had an opportunity to respond to this argument, the Court finds it appropriate to address this issue.

As discussed in the Ninth Circuit Bankruptcy Appellate Panel's decision in *Plyam v. Precision Dev., LCC (In re Plyam)*, the law under which a corporate agreement arose or by which it is governed applies in determining whether an express or technical trust existed for purposes of § 523(a)(4). Defendant contends that during his tenure Friendgiftr was a California corporation and, therefore, that California law should apply.

The determination of whether Friendgiftr was a California or Delaware Corporation when Defendant breached his fiduciary duties is a question of fact. However, such a determination is not material for purposes of this motion because the outcome is the same under either state's laws. This Court has already addressed Plaintiffs' failure to demonstrate that Defendant's conduct gave rise to an express trust

such that he was acting in a fiduciary capacity under California law in its October 2, 2018 Ruling:

> The Court notes that the LASC found that 'Defendant was co-CEO and co-President of the Board of Directors of Friendgiftr . . . and admit[ted] that he owed a fiduciary duty to Friendgiftr during the relevant times.' Plaintiffs' RFJN, Ex. 1. But the Ninth Circuit made clear in *In re Cantrell* that 'under California law a corporate officer is not a fiduciary within the meaning of § 523(a)(4).' 329 F.3d at 1128. The *Cantrell* court explained, "although officers and directors [under California law] are imbued with the fiduciary duties of an agent and certain duties of a trustee, they are not trustees with respect to corporate assets.' *Id.* at 1126; *see also Saccheri v. St. Lawrence Valley Dairy (In re Saccheri)*, 2012 WL 5359512, at * 11 (B.A.P. 9th Cir. Nov. 1, 2012), *aff'd*, 559 F. App'x 687 (9th Cir. 2015) (Rejecting argument that defendant was trustee for purposes of § 523(a)(4) based on the fact that defendant was 'entrusted with the bank accounts' and 'had virtually 'unlimited sway over them'').

Doc. No. 41, p. 9. Plaintiffs Supplemental Brief does not add any new arguments or evidence to change the outcome if this Court were to apply California law.

As discussed below, this Court also finds that Plaintiffs have not established that an express trust existed under Delaware law within the meaning of § 523(a)(4).

1. **Defendant's Role as an Officer and Director of Friendgiftr Does Not Give Rise to an Express Trust Under Delaware Law**

Plaintiffs cite a single case, *Matter of Reading Co.,* 711 F.2d 509, 517 (3d. Cir. 1983), with the following citation: "[under Delaware law, corporate directors] stand in a fiduciary relationship to their corporation and its stockholders," but provide no further analysis.

From this Court's limited canvass of applicable Delaware law, it appears the mere fact that the Defendant was an officer and director of Friendgiftr does not give rise to an express trust. *See e.g., Guth v. Loft, Inc.,* 5 A.2d 503, 510 (Del. 1939) ("Corporate

officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders"). Furthermore, notwithstanding the Delaware Supreme Court's use of the term "express trust" in discussing corporate breaches of fiduciary duty in its seminal case *Bovay v. H.M. Byllesby & Co.,* 27 Del. Ch. 381, (Del. 1944), it appears such imposition of an express trust arises because of, and not prior to, any wrongdoing:

> Sound public policy requires the acts of corporate officers and directors in dealing with the corporation to be viewed with a reasonable strictness … where they are required to answer for wrongful acts of commission by which they have enriched themselves to the injury of the corporation, a court of conscience will not regard such acts as mere torts, but as serious breaches of trust, and will point the moral and make clear the principle that corporate officers and directors, while not in strictness trustees, will, in such case, be treated as though they were in fact trustees of an express and subsisting trust . . . .

27 Del. Ch. 381, 409-410.

Therefore, without more, the fact that the LASC found that Defendant breached his fiduciary duties while acting as an officer and director of Friendgiftr is insufficient to establish the existence of an express trust within the meaning of § 523(a)(4).

2. Questions of Material Fact Exist as to Whether the Agreement Created an Express Trust

Plaintiffs also contend that the Agreement created an express trust because the terms of the Agreement satisfy the requisite elements for creation of an express trust **[Note 1]**. Furthermore, Plaintiffs assert that the LASC already found that the Defendant used Plaintiffs' investment money for expenses that were not authorized by the Agreement. Supplemental Brief, citing RJN Ex. 1, p.3:4-16, 23-26 and p.4:5-8.

There is no specific reference to the Agreement in the LASC's findings and it is not readily apparent that the LASC ever reviewed or considered the Agreement. Furthermore, certain terms in the Agreement raise triable issues of material fact

regarding the validity and enforceability of the Agreement. For example, the first sentence of the agreement states "In consideration of the investment to be made by Investor, the following terms and conditions by and between Company and Investor *shall be incorporated into appropriate existing and future documents to give them full force and effect*." Supplemental Brief, Ex. 1 (emphasis added). Paragraph 17 on page 3 states "This Agreement and all proposed agreements are not binding on Company and Investor until all final documents reflecting Investor's Investment are fully executed by all parties." *Id.* Finally, the last paragraph of the Agreement states: "Upon receipt of this Agreement properly executed, we will execute it, and return a copy to you for your records. Following that, we will engage a legal representative in California to prepare the appropriate documents memorializing our Agreement." *Id.*

Additionally, Defendant appears to raise triable issues of fact concerning the authenticity and enforceability of the Agreement and Plaintiffs have not presented evidence demonstrating that Defendant is precluded from raising these challenges to the Agreement. *E.g. see* Supplemental Opposition, ¶ 5 ("'Exhibit 1' Plaintiff has attached in their declaration is falsified. In particular, the document shows strikingly bright blue ink from Plaintiff ('May 5, 2009' and their signature) and dark black ink from others ink on document (which for a supposedly 10 year old document is highly unusual) . . . .").

Therefore, Plaintiffs have failed to establish as a matter of law that an express trust existed.

Based on the foregoing, Plaintiffs request for entry of judgment in their favor under § 523(a)(4) is denied.

C. Plaintiffs' Request For Leave to Amend is Denied

Plaintiffs seek leave to amend pursuant to Civil Rule 15. However, because the Court has entered a Scheduling Order [Doc. No. 15], the Plaintiffs' request for leave to amend is governed by *both* Civil Rules 16 and 15. As the Ninth Circuit has held, "[o]nce the … court has filed a pretrial scheduling order pursuant to [Civil Rule] 16 … that rule's standards [control]" with respect to a request for leave to amend. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). Civil Rule 16(b)(4) provides that a scheduling order "shall not be modified except upon a

showing of good cause and by leave of the … judge." Civil Rule 16's "good cause" standard "primarily considers the diligence of the party seeking the amendment. The … court may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Johnson*, 975 F.2d at 609.

If the Plaintiffs can demonstrate "good cause" under Civil Rule 16, the Plaintiffs must then show that amendment is also appropriate under Civil Rule 15. *See Johnson*, 975 F.2d at 609 (explaining that the "party seeking to amend [the] pleading after [the] date specified in [the] scheduling order must first show 'good cause' for amendment under Rule 16(b), then, if 'good cause' be shown, the party must demonstrate that amendment was proper under Rule 15").

The only basis for Plaintiffs' request for leave to amend is that their original counsel did not believe they had a viable embezzlement claim under § 523(a)(4) and did not plead that claim in the Complaint, but now Plaintiffs believe they could succeed on such a claim under applicable Ninth Circuit law.

In this Court's view, regret over a poor strategic decision is not "good cause" to grant Plaintiffs leave to amend and Plaintiffs fail to cite any authority in which a Court determined this was "good cause" within the meaning of Civil Rule 16 (or Civil Rule 15). Furthermore, this case has been pending for fifteen months, since October 23, 2017, and this Court has already made several accommodations for the Plaintiffs. On this record, the Court does not find that Plaintiffs have acted diligently in seeking to amend their complaint.

Having determined that the Plaintiffs have not shown "good cause" under Civil Rule 16 with respect to the request for leave to amend, it is unnecessary to consider whether the Plaintiffs have satisfied Civil Rule 15.

Therefore, Plaintiffs request for leave to amend is denied.

D. The Court Sets New Pretrial Conference and Trial Dates

The Court previously vacated the Pretrial Conference and trial dates and ordered Plaintiff to file the motion for summary judgment. By separate order, the Court will set new Pretrial Conference and trial dates. The Pretrial Conference shall take place

10:00 AM

CONT... ROBERT MARK CARPENTER **Chapter 7**

on **May 14, 2019, at 11:00 a.m.** Trial shall take place during the week of **May 28, 2019**. The exact date of the trial will be set at the Pretrial Conference.

III. Conclusion

For the reasons set forth above, the OSC is discharged and the Motion is DENIED in its entirety.

After the hearing, the Court will prepare an order consistent with this tentative ruling.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Jessica Vogel at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1: Plaintiffs' Supplemental Brief tracks California law with respect to creation of a trust.
Under California law, "the essential elements of an express trust are (1) sufficient words to create a trust; (2) a definite subject; and (3) a certain and ascertained object or res." *Banks v. Gill Distribution Ctrs., Inc. (In re Banks)*, 263 F.3d 862, 871 (9th Cir. 2001). Delaware law requires a similar, but not identical, showing: the "elements of an express trust are a competent settlor and trustee, intent, sufficient words to create a trust, an ascertainable trust res, certain ascertained beneficiaries, a legal purpose, and a legal term." *In re Moran*, 413 B.R. at 186. This Court again finds that it need not determine whether to apply California or Delaware law because, as set forth above, material questions of fact exist that prevent this Court from entering judgment in Plaintiffs' favor.

Party Information

Debtor(s):

ROBERT MARK CARPENTER Represented By

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

CONT... ROBERT MARK CARPENTER **Chapter 7**

Paul C Nguyen

Defendant(s):

ROBERT MARK CARPENTER	Pro Se

Plaintiff(s):

Fred Rosenberg	Represented By Leonard Pena
FRIENDGIFTR, INC	Represented By Leonard Pena

Trustee(s):

Timothy Yoo (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM
2:18-22337 Lannette Denise Johnson **Chapter 7**

#5.00 Show Cause Hearing
RE: [18] **Order Requiring Debtor To Appear And Show Cause Why Case Should Not Be Dismissed Because Of Debtor's Failure To Pay The Filing Fee In Installments.**

Docket 1
***** VACATED *** REASON: DISMISSED 12/17/18**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Lannette Denise Johnson Pro Se

Trustee(s):

Heide Kurtz (TR) Pro Se

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM
2:18-24473 Brandon Ellis **Chapter 7**

#6.00 Status HearingRE: [1] Chapter 7 Involuntary Petition Against an Individual. Sarah) Additional attachment(s) added on 12/13/2018 (Cowan, Sarah). Additional attachment(s) added on 12/13/2018 (Cowan, Sarah). Additional attachment(s) added on 12/13/2018 (Cowan, Sarah).

Docket 1

Tentative Ruling:

1/22/2019

The involuntary petition is DISMISSED for the reasons set forth below.

Pleadings Filed and Reviewed:
1) Involuntary Petition Against a Non-Individual [Doc. No. 1]
2) Summons and Notice of Status Conference in an Involuntary Bankruptcy Case [Doc. No. 3]

The Petitioning Creditor has failed to file a proof of service establishing that the Summons, Notice of Status Conference, and Involuntary Petition were served upon the Alleged Debtor. The Summons issued to the Petitioning Creditor clearly informs the Petitioning Creditor of the obligation to serve the Summons, Notice of Status Conference, and Involuntary Petition upon the Alleged Debtor. The Summons further advises the Petitioning Creditor that failure to properly effectuate service may result in dismissal of the involuntary petition.

Local Bankruptcy Rule 1010-1 provides in relevant part: "The court may dismiss an involuntary petition without further notice and hearing if the petitioner fails to … (c) serve the summons and petition within the time allowed by FRBP 7004; (d) file a proof of service of the summons and petition with the court; or (e) appear at the status conference set by the court."

Based upon the foregoing, the involuntary petition is DISMISSED. The Court will prepare and enter an appropriate order.

Party Information

Debtor(s):

Brandon Ellis Pro Se

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

CONT... Brandon Ellis **Chapter 7**

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

2:18-18021 Sultan Financial Corporation **Chapter 11**

#7.00 Hearing
RE: [231] Application for Compensation for Martini Akpovi Partners LLP, Accountant, Period: 8/19/2018 to 10/31/2018, Fee: $43,898.90, Expenses: $451.60.

Docket 231

***** VACATED *** REASON: CONTINUED 2-6-19 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sultan Financial Corporation

Represented By
Jeffrey N Brown
David A Warfield
Mark S Horoupian
Richard G Reinis

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

2:18-18021 Sultan Financial Corporation **Chapter 11**

#8.00 Hearing
RE: [230] Application for Compensation for Dady & Gardner P.A., Special Counsel, Period: 7/13/2018 to 8/31/2018, Fee: $23,144.13, Expenses: $1,994.21

Docket 231

***** VACATED *** REASON: CONTINUED 2-6-19 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sultan Financial Corporation — Represented By
Jeffrey N Brown
David A Warfield
Mark S Horoupian
Richard G Reinis

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM
2:18-18021 Sultan Financial Corporation **Chapter 11**

#9.00 Hearing
RE: [229] Application for Compensation for Thompson Coburn LLP, Debtor's Attorney, Period: 7/13/2018 to 11/29/2018, Fee: $341,607.50, Expenses: $12,610.68.

Docket 229
***** VACATED *** REASON: CONTINUED 2-6-19 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sultan Financial Corporation — Represented By
Jeffrey N Brown
David A Warfield
Mark S Horoupian
Richard G Reinis

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM
2:18-18021 Sultan Financial Corporation **Chapter 11**

#10.00 Hearing
RE: [227] Motion to Dismiss Debtor Debtors Motion For Entry Of An Order Dismissing Chapter 11 Case

Docket 227
***** VACATED *** REASON: CONTINUED 2-6-19 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sultan Financial Corporation
Represented By
Jeffrey N Brown
David A Warfield
Mark S Horoupian
Richard G Reinis

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM
2:18-18021 Sultan Financial Corporation **Chapter 11**

#11.00 Hearing
RE: [221] Motion to Reject Lease or Executory Contract (Copier Lease with Canon Financial)

Docket 221
***** VACATED *** REASON: CONTINUED 2-6-19 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sultan Financial Corporation — Represented By
Jeffrey N Brown
David A Warfield
Mark S Horoupian
Richard G Reinis

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

2:18-18021 Sultan Financial Corporation **Chapter 11**

#12.00 Hearing
RE: [224] Motion to Reject Lease or Executory Contract (unexpired postage meter lease)

Docket 224

***** VACATED *** REASON: CONTINUED 2-6-19 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sultan Financial Corporation — Represented By
Jeffrey N Brown
David A Warfield
Mark S Horoupian
Richard G Reinis

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM
2:18-18021 Sultan Financial Corporation **Chapter 11**

#13.00 Status conference re chapter 11 case

FR. 7-17-18; 8-8-18; 10-10-18; 11-7-18; 12-12-18

Docket 4
***** VACATED *** REASON: CONTINUED 2-6-19 AT 10:00 A.M.**

Tentative Ruling:

12/11/2018

Amended After hearing in RED
Tentative Ruling:
Having reviewed the Debtor's Status Report, the Court finds that the Debtor is making sufficient progress toward resolving this case. The Debtor's contemplated motion seeking dismissal pursuant to §1112(b) shall be heard on January 23, 2019 at 10:00 a.m. The motion shall be filed and lodged in accordance with the local rules.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Jessica Vogel at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Sultan Financial Corporation Represented By
Jeffrey N Brown

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

2:18-20151 Verity Health System of California, Inc. **Chapter 11**

#14.00 Hearing

RE: [564] *Motion Pursuant to Bankruptcy Rule 7052(B) for Amendment of Findings in Final Order (I) Authorizing Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, and (VI) Granting Related Relief*

*fr. 12-4-18 ;*fr. 12-5-18; 12-6-18

Docket 564

Tentative Ruling:

1/22/2019

Hearing required. The Court has received Movant's latest pleading amending its request.

Party Information

Debtor(s):

Verity Health System of California, Represented By
Samuel R Maizel
John A Moe II
Tania M Moyron
Claude D Montgomery
Sam J Alberts

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

2:18-20151 Verity Health System of California, Inc. **Chapter 11**

#15.00 Hearing
RE: [399] Motion to Reject Lease or Executory Contract / Notice of Motion and Motion to Reject Pursuant to 11 U.S.C. § 365(a) Professional Services Agreement with All Care Medical Group, Inc. and Related Executory Contracts and Unexpired Lease Nunc Pro Tunc; Memorandum of Points and Authorities; Declaration # 6 Exhibit E (part 2) # 7 Exhibit F # 8 Exhibit G (part 1) # 9 Exhibit G (part 2)) (Moyron, Tania)

FR. 10-24-18; 11-7-18

Docket 399

Tentative Ruling:

1/22/2019

See Cal. No. 17, below, incorporated in full by reference.

Party Information

Debtor(s):

Verity Health System of California,

Represented By
Samuel R Maizel
John A Moe II
Tania M Moyron
Claude D Montgomery
Sam J Alberts

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

2:18-20151 Verity Health System of California, Inc. **Chapter 11**

#16.00 Hearing
RE: [576] Motion to Reject Lease or Executory Contract Debtors Notice Of Motion And Motion To Reject, Pursuant To 11 U.S.C. § 365(A), Professional Services Agreement With All Care Medical Group, Inc. And Related Executory Contracts And Unexpired Lease Nunc Pro Tunc; Memorandum Of Points And Authorities; Declaration Of Stephen Campbell, M.D. [Filed Only To Amend Docket No. 399 In Accordance With Order Docket No. 522] (Moyron, Tania)

fr. 11-7-18; 12-12-18

Docket 576

Tentative Ruling:

1/22/2019

See Cal. No. 17, below, incorporated in full by reference.

Party Information

Debtor(s):

Verity Health System of California,

Represented By
Samuel R Maizel
John A Moe II
Tania M Moyron
Claude D Montgomery
Sam J Alberts

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

10:00 AM

2:18-20151 Verity Health System of California, Inc. **Chapter 11**

#17.00 HearingRE: [1180] Motion Debtors' Notice and Motion to Approve Settlement and Asset Purchase Agreement By and Between the Debtors, Verity Medical Foundation and Verity Health Services of California, Inc., and All Care Medical Group, Inc.; Declaration of Richard G. Adcock in Support Thereof (Moyron, Tania)

Docket 1180

Tentative Ruling:

1/22/2019

Hearing required.

Party Information

Debtor(s):

Verity Health System of California,

Represented By
Samuel R Maizel
John A Moe II
Tania M Moyron
Claude D Montgomery
Sam J Alberts
Shirley Cho

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

11:00 AM

2:12-29275 Monge Property Investments, Inc. **Chapter 11**

#100.00 Hearing
RE: [683] Motion for approval of chapter 11 disclosure statement (SECOND AMENDED) Describing Second Amended Chapter 11 Plan Of Reorganization And Setting Dates And Procedures For Approval Of Second Amended Chapter 11 Plan Of Reorganization; Memorandum Of Points And Authorities; Declaration Of Ruben Monge, Jr. In Support Thereof, with Proof of Service

FR. 11-7-18

Docket 683

***** VACATED *** REASON: CONTINUED TO 3-6-19 AT 11:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Monge Property Investments, Inc. Represented By
Matthew D. Resnik
Roksana D. Moradi-Brovia

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 23, 2019 **Hearing Room 1568**

11:00 AM
2:18-21828 F.A.S.S.T. LLC **Chapter 11**

#101.00 HearingRE: [93] Motion to Consolidate Lead Case 18-21828 with 18-21723
WARNING: Incorrect hearing year on document. Matter is not on calendar for 1-23-2018 at 11:00 A.M. See docket entry #[96] for corrective action; Modified on 12/27/2018 (Evangelista, Maria).

Docket 93

Tentative Ruling:

1/22/2019

For the reasons set forth below, the Motion is GRANTED in its entirety.

Pleadings Filed and Reviewed

1. Debtors' and Debtors-In-Possession's Motion for Substantive Consolidation of Jointly Administered Cases [Doc. No. 93] (the "Motion")
2. Declaration of Charles DeBus in Support of Debtors' and Debtors-In-Possession's Motion for Substantive Consolidation of Jointly Administered Cases [Doc. No. 94] (the "DeBus Declaration")
3. Notice of Errata [Doc. No. 100]
4. Notice of Motion [Doc. No. 101]
5. As of the preparation of this tentative ruling, no opposition is on file

I. Facts and Summary of Pleadings

Debtors-in-possession, F.A.S.S.T., LLC ("FASST") and Los Angeles Training Center, LLC ("LATC," and together with FASST, the "Debtors") move to substantively consolidate their estates, such that the assets of and claims against both estates are treated as existing against only a single pooled estate.

The Debtors also request that any order granting the Motion be effective *nunc pro tunc* to October 5, 2018 – the date that LATC filed its chapter 11 petition (four days prior to FASST's October 9, 2018 filing). The Debtors submit that *nunc pro tunc* relief is appropriate because (1) the Debtors filed petitions for relief within four days of one another and there is unlikely to be an substantial undue prejudice resulting

from the court granting *nunc pro tunc* relief; (2) it would reduce the administrative costs in preventing creditors from stating that possible fraudulent transfers or preferences were received from FASST instead of LATC; and (3) it would simplify the administrative process altogether.

As of the preparation of this tentative ruling, no opposition is on file.

II. Findings of Fact and Conclusions of Law

Substantive consolidation is a general equitable power of the Bankruptcy Court. The procedure combines the assets and liabilities of multiple estates into a single pooled estate, and is used to avoid prejudice to creditors who have dealt with multiple entities as a single entity. In the Ninth Circuit, substantive consolidation is appropriate where (1) creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit or where (2) the affairs of the debtors are so entangled that consolidation would benefit all creditors. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750 (9th Cir. 2000).

Here, both prongs of the *Bonham* test are satisfied. As detailed in the Declaration of Charles DeBus, the Debtors' managing member, creditors have generally dealt with the Debtors as a single economic unit, did not rely on their separate identity in extending credit, and the affairs of the Debtors' are inextricably entangled. Consolidation benefits all creditors by increasing the distribution they will receive on account of their claims. Treatment of two estates as a single estate will reduce administrative costs and thus increase all creditors' recovery.

Additionally, the Debtors' stated reasons for seeking *nunc pro tunc* relief are appropriate. *Bonham*, 229 F.3d at 765 (internal citations omitted) ("bankruptcy courts have sanctioned the substantive consolidation of two or more entities *nunc pro tunc* in order to allow a trustee or creditors to attach fraudulent transfers or avoidable preferences made by the debtor or consolidated entities as of the date of filing of the initial bankruptcy petition").

For the reasons set forth above, the Motion is GRANTED in its entirety.

The Debtors are directed to lodge a conforming proposed order, incorporating this

11:00 AM

CONT... F.A.S.S.T. LLC **Chapter 11**

tentative ruling by reference, within seven days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Jessica Vogel at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

F.A.S.S.T. LLC

Represented By
Robert M Yaspan