

UNITED STATES BANKRUPTCY COURT
DEPARTMENT 2
JUDGE LOUISE DeCARL ADLER, PRESIDING
THURSDAY, DECEMBER 15, 2016

10:30 AM

07-06613-LA Ch 7 **PROFESSIONAL SATELLITE AND COMMUNICATION, LLC**

OBJECTION BY TRUSTEE TO CLAIM OF JONATHAN SHIFF (NO. 41) FILED BY KEVIN J. HOYT ON BEHALF OF NANCY WOLF.

Tentative Ruling: PROCEDURAL RULING:

The Shiff estate's objection to new matters raised in Reply (specifically, the "extinguishment/merger argument" under CA law and Motion to Strike said references as new matter **GRANTED**). The argument raised for the first time in the Reply is completely outside the scope of the original claim objection and nothing in the Shiff estate's Opposition opens the door to considering same. Alternatively, Court grants motion because the new argument assumes that the Shiff Ch. 11 estate and Jonathon Shiff, the person, are legally one and the same. This assumption is incorrect because the Shiff estate is an entity created under Section 541 upon the filing of a Ch. 11 petition; it is a distinct taxable entity operating in the nature of a business trust for the benefit of Shiff's creditors and not for the benefit of Shiff. It is the Shiff Ch. 11 estate that owns Claim No. 41 -- not Shiff, individually, who is the judgment co-obligor. [See Schiff ECF #605, Ex. A at para. 8; ProSat ECF #238 (Transfer of Claim)].

SUBSTANTIVE RULING:

Trustee's Objection to Claim 41 **SUSTAINED**. Claim disallowed. This claim objection turns on the interpretation of the Settlement Agreement between the Shiff estate and ProSat approved by this Court as to ProSat and by Judge Taylor as to the Shiff Ch. 11 case in July 2009 (hereinafter "Shiff-ProSat Settlement Agreement" or "SA"). Under the SA, the Shiff estate released all claims and possible claims against ProSat relating to Imagitas' claims against Shiff and ProSat, except for a possible claim if the Shiff estate paid Imagitas on its Claim No. 50 in the Shiff Ch. 11 case. If that occurred and Imagitas' claim against ProSat was reduced by reason of that payment, the Shiff estate would then have a claim for contribution against ProSat. That occurrence was the only possible residual basis for a claim by the Shiff estate against ProSat. The release in the SA executed by the ProSat trustee and the Shiff estate contained the broadest possible language:

Except for the rights and claims affirmed and/or created by the [SA] ... Shiff, on behalf of himself and as applicable on behalf of his administrators, executors, estates ... successors and/or assigns, and on behalf of all persons acting by, through or under or in concert with Shiff ... hereby releases, remises and forever discharges the Prosat Bankruptcy Estate ... from any and all claims, debts, liabilities, offsets, demands, obligations, damages, losses, costs, expenses, attorney's fees, actions and/or causes of action of any character, nature and kind whatsoever, known or unknown, suspected or unsuspected, arising out of resulting from, related to, or in connection with the Shiff Bankruptcy Case, the Prosat Chapter 7 case, the Wolf v. Shiff and Madison Adversary Proceeding and/or the Wolf/Shiff Bankruptcy Claim. This release shall not release any of the Shiff claims in the Prosat Chapter 7 Case as deemed allowed and/or affirmed in the [SA] nor released any rights created in the [SA]

[ProSat ECF #225, Ex. B at ¶ 5.1 (emphasis added)]

While the SA does not specifically release Imagitas' claim against both the Shiff estate and the ProSat estate (nor could it since Imagitas was not a party to the SA), the Court concludes this claim was within the fair contemplation of the release for the following reasons:

1. Both Shiff and ProSat were joint and several co-obligors under a judgment in favor of Imagitas.
2. Imagitas had filed proofs of claim in each bankruptcy estate for the full amount of the judgment.
3. The spirit of the SA and its intended purpose was to resolve all claims of these parties against each other related to the Imagitas judgment unless actual payment was made by Shiff to Imagitas.

The Shiff estate's attempt to back door a claim against ProSat by subsequently acquiring from Imagitas its proof of claim #41 against ProSat (for no monetary consideration) is, in the Court's view, a violation of the spirit of the SA. As the parties agreed in the SA, the only possible avenue for the Shiff estate to retain a claim against ProSat was for Shiff to have paid Imagitas' claim and then make a claim against ProSat for the aliquot portion.

Finally, the Court rejects the ProSat trustee's judicial estoppel argument. Application of judicial estoppel typically involves consideration of the following 3 factors: (1) whether it is shown that the party to be estopped has clearly taken a position that is wholly inconsistent with its earlier position; (2) whether the party to be estopped has succeeded in persuading a court to accept that party's earlier position; and (3) whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 121 S. Ct. 1808, 1815 (2001). The record in this case is not sufficient to disallow Claim No. 41 on the grounds of judicial estoppel. The Court has reviewed the docket in the Shiff case and cannot find that the Shiff estate successfully persuaded Judge Taylor to grant the motion to sell the Ruelle Monte Carlo property because the Shiff estate's Claim No. 41 in the ProSat case was represented to be "\$0". Further there is no evidence that she deemed this finding necessary or relevant to her ruling on the sale motion. The record establishes that Imagitas had a judicial lien (in fourth position) on the Ruelle property and in a Sec. 363(f) sale a debtor can sell property free and clear of liens. This Court is unclear how an unsecured claim in ProSat's case would be important or relevant to Judge Taylor's decision to permit the sale. This Court declines to speculate whether she accepted or adopted the prior inconsistent representation of the Shiff estate in order to approve the sale.

ATTORNEY: WILLIAM P. FENNELL (PROFESSIONAL SATELLITE AND COMMUNICATION)

02:00 PM

14-09427-LA Ch 7 PEGGY SUE DAY

ADV: 16-90044 CHRISTOPHER BARCLAY v. PEGGY SUE DAY & WILLIAM B. RODIGER

PRE-TRIAL STATUS CONFERENCE (Fr 11/17/16)

ATTORNEY: LISA TORRES (CHRISTOPHER BARCLAY)

15-07217-LA Ch 7 ERIC GREGORY & DIANA CHICK

ADV: 16-90030 EDUARDO S. ESPINOSA v. ERIC GREGORY CHICK

PRE-TRIAL STATUS CONFERENCE

ATTORNEY: GREGORY K. JONES (EDUARDO S. ESPINOSA)

ATTORNEY: VINCENT RENDA (ERIC GREGORY CHICK)

02:00 PM

15-07229-LA Ch 11 KAMRON EVERGREEN LLC

ADV: 16-90017

KAMRON EVERGREEN, LLC v. BAHMAN JALALI AS TRUSTEE OF THE JALALI F & BIJAN JALALI AS TRUSTEE OF THE JALALI FA & ROXANNE HUDSON

- 1) (stip to cont to 1/19/17 at 2:30 to come-Courtney)DEFENDANTS' APPLICATION (1) FOR ORDER TO SHOW CAUSE RE WHY A CONTEMPT CITATION SHOULD NOT ISSUE RE: FAILURE OF MOHAMMAD J. SHABAN TO APPEAR AT DEPOSITION PURSUANT TO SUBPOENA. FRBP 9016 AND FRCP 45(G) AND REQUEST FOR MONETARY AND EVIDENTIARY SANCTIONS, AND (2) MOTION FOR ORDER EXCLUDING TESTIMONY OF MOHAMMAD SHABAN UNDER COURTS INHERENT AUTHORITY TO MANAGE COURSE OF TRIALS AND EVIDENCE FILED BY KYLE YAEGE ON BEHALF OF BAHMAN JALALI AS TRUSTEE OF THE JALALI FAMILY TRUST, BIJAN JALALI AS TRUSTEE OF THE JALALI FAMILY TRUST DATED 8/31/2005.

Tentative Ruling: Court has been informed that stipulation continuing this matter is being prepared. If it is not entered prior to this hearing date, parties must appear.

- 2) (stip to cont to 1/19/17 at 2:30 to come-Courtney)PRE-TRIAL STATUS CONFERENCE (Fr 12/1/16)

Tentative Ruling: Court has been informed that stipulation continuing this matter is being prepared. If it is not entered prior to this hearing date, parties must appear.

ATTORNEY: ANDREW H. GRIFFIN (KAMRON EVERGREEN, LLC)

ATTORNEY: WILLIAM L. MILTNER (ROXANNE HUDSON)

ATTORNEY: KYLE YAEGE (BAHMAN JALALI AS TRUSTEE FAM TR., BIJAN JALALI AS TRUSTEE FAM TR, BAHMAN JALALI AS TRUSTEE OF THE JALALI F, BIJAN JALALI AS TRUSTEE OF THE JALALI FA)

15-07230-LA Ch 11 CYRUS CARROLL LLC

ADV: 16-90018

CYRUS CARROLL, LLC v. BAHMAN JALALI AS TRUSTEE OF THE JALALI F & BIJAN JALALI AS TRUSTEE OF THE JALALI FA & ROXANNE HUDSON

- 1) (stip to cont to 1/19/17 at 2:30 to come-Courtney)DEFENDANTS APPLICATION (1) FOR ORDER TO SHOW CAUSE RE WHY A CONTEMPT CITATION SHOULD NOT ISSUE RE: FAILURE OF MOHAMMAD J. SHABAN TO APPEAR AT DEPOSITION PURSUANT TO SUBPOENA. FRBP 9016 AND FRCP 45(G) AND REQUEST FOR MONETARY AND EVIDENTIARY SANCTIONS, AND (2) MOTION FOR ORDER EXCLUDING TESTIMONY OF MOHAMMAD SHABAN UNDER COURTS INHERENT AUTHORITY TO MANAGE COURSE OF TRIALS AND EVIDENCE FILED BY KYLE YAEGE ON BEHALF OF BAHMAN JALALI AS TRUSTEE OF THE JALALI FAMILY TRUST, BIJAN JALALI AS TRUSTEE OF THE JALALI FAMILY TRUST DATED 8/31/2005.

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Tentative Ruling: Court has been informed that stipulation continuing this matter is being prepared. If it is not entered prior to this hearing date, parties must appear.

ATTORNEY: ANDREW H. GRIFFIN (CYRUS CARROLL, LLC)

ATTORNEY: WILLIAM L. MILTNER (ROXANNE HUDSON)

ATTORNEY: KYLE YAEGE (BAHMAN JALALI AS TRUSTEE OF THE JALALI F, BIJAN JALALI AS TRUSTEE OF THE JALALI FA)

02:00 PM

16-01677-LA Ch 7 SHLOMO GRUER

ADV: 16-90109 CIT BANK, N.A. v. SHLOMO GRUER

PRE-TRIAL STATUS CONFERENCE

ATTORNEY: GEORGE C. LAZAR (CIT BANK, N.A.)

ATTORNEY: K. TODD CURRY (SHLOMO GRUER)

02:00 PM

16-02921-LA Ch 7 ANDREW S. & ANGELIA R. RUSSELL

MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY AND MOTION FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION FILED BY ADAM B. ARNOLD ON BEHALF OF ANDREW S. RUSSELL

Tentative Ruling: Motion for Sanctions for Violation of Automatic Stay and for Violation of Discharge Injunction **DENIED.**

First, this Application seeks an OSC for contempt and sanctions imposition only against USE Credit Union and not its attorneys CIR. [See Applcn., para 2, prayer at para. A-D]. To the extent this is a request for sanctions against CIR, it is denied.

Second, to the extent this Application seeks relief for violation of the automatic stay, it is denied. The evidence is that all of the collection activity that took place did so either prior to the bankruptcy filing or after the debtors received their discharge. Therefore, there is no stay violation.

Third, as to the request for a finding of contempt for violation of the discharge injunction and an award of sanctions, the Court has discretionary authority to award sanctions pursuant to Sec. 105(a). *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir., 2002). To establish contempt, the debtor must show by *clear and convincing evidence* that (1) the respondent knew the discharge injunction was applicable and (2) the respondent intended the actions which violated the discharge injunction. *Bennett*, *id.* at 1069. In determining the respondent's intent, the focus "is not on the subjective beliefs or intent of the [respondent] in complying with the order, but whether, in fact, their conduct complied with the order at issue." *In re Dyer*, 322 F. 3d 1178, 1191(9th Cir. 2003). If the debtor can satisfy this burden of proof, then the burden shifts to the respondent to show why they were unable to comply with the discharge injunction. *Bennett*, 298 F. 3d at 1069. Important for debtor's motion, unlike Sec. 362(k) where sanctions are mandatory, an award of contempt sanctions under Sec. 105(a) is discretionary. *In re Del Mission Ltd.*, 98 F. 3d 1147, 1153 (9th Cir., 1996)

Applying the above-mentioned standards, the Court is not convinced that an award of sanctions is merited. What we have here is a mix-up--one created, in part, by the negligence of both USE and the debtors. USE should have forwarded the notice of bankruptcy filing to its collection attorney (CIR) upon receipt of this notice. Further, it appears that USE believed the state court action was filed pre-bankruptcy so they had another basis to believe that CIR would be getting its own notice of the debtor's filing. USE understood that its collection agent CIR regularly researched whether the debtors had filed a bankruptcy before filing suit. Based on this record, there is no clear an convincing evidence that USE intended to violate the discharge injunction. To the contrary, upon learning of the discharge violation, USE took prompt corrective action to dismiss the state court action. At most this is a minor technical violation of the discharge injunction and debtors unquantified "damages" in the form of embarrassment is insufficient to support an award.

Debtors, as a courtesy, should have included the address of USE's collection agent CIR in their bankruptcy schedules and the creditor matrix for "notice purposes" in accordance with the correspondence they had previously received from USE pre-bankruptcy.

It appears that debtors' attorney's fees were, in the main, unnecessary and the request of \$15K/violation excessive under the facts of this case. Debtors could have minimized their fees by simply asking their counsel to

telephone CIR.

In the future, USE should promptly forward all of its bankruptcy notices to its collection agents instead of assuming their collection agent will diligently search the public records or that the debtors will comply with the instructions in the collection letter that tells them to contact the collection agent for all future correspondence.

If counsel for the debtors is prepared to accept the tentative ruling, he should advise counsel for USE and the courtroom deputy and appearances will be excused. In that event, USE shall prepare and lodge an order in accordance with the tentative ruling.

ATTORNEY: ADAM B. ARNOLD (ANDREW S. RUSSELL, ANGELIA R. RUSSELL)

02:00 PM

16-04915-LA Ch 7 STEPHEN C HANN

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND ALLY FINANCIAL

Tentative Ruling: Motion to Reaffirm Debt to Ally Financial **DENIED**. Debtors' budget is negative by more than \$1700/mo. and this vehicle has negative equity (fmv is \$5K less than debt) and debtor has two other vehicles he could drive. Reaffirmation is not in debtors' best interest.

If debtor is prepared to accept this tentative ruling, he should notify the courtroom deputy and his appearance will be excused; Court will enter order denying this request.

ATTORNEY: DAVID G. WEIL (STEPHEN C HANN)

16-05000-LA Ch 7 DELILA HURTADO

MOTION TO EXTEND TIME TO OBJECT TO THE DISCHARGE OR TO CHALLENGE WHETHER CERTAIN DEBTS ARE DISCHARGEABLE, FILED BY JOHN B. LAING ON BEHALF OF JERRY STAPLES

Tentative Ruling: Motion to Extend Time to Object **GRANTED**. Unopposed. Movant is granted 60 days from date he filed this motion (11/15/16) to file his complaint. No further extensions will be granted.

Appearance of counsel excused. Submit order.

ATTORNEY: CHRISTOPHER R. BUSH (DELILA HURTADO)

16-05196-LA Ch 7 MARTHA ELENA ALDRETE

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND CAPITAL ONE AUTO FINANCE

Tentative Ruling: Motion to Reaffirm Debt to Capital One Auto Finance **DENIED**. Debtors' budget is negative by more than \$600/mo. and she is unemployed. This vehicle has negative equity (fmv is \$1K less than debt). Reaffirmation is not in debtors' best interest.

If debtor is prepared to accept this tentative ruling, she should notify the courtroom deputy and her appearance will be excused; Court will enter order denying this request.

02:00 PM

13-11224-LA Ch 7 JOSEPH PHILIP AFSHARI

TRUSTEE'S MOTION FOR COURT APPROVAL NOTICING SALE OF 275
AFSHARI DRIVE, 3790 AND 3790A AFSHARI CIRCLE FILED BY NANNETTE
FARINA ON BEHALF OF GERALD H. DAVIS

Tentative Ruling: Motion to Sell Real Property and pay certain liens, claims, commissions,
usual escrow costs and the debtor's homestead exemption **GRANTED**.
Unopposed.

The Trustee has not indicated whether there were any timely-received
overbids made pursuant to the procedure set forth in the notice of sale.
Absent any, the Court is prepared approve this sale to Mr. Torry and to
make a Sec. 363(m) finding that the proposed sale to this buyer was
pursuant to Trustee's sound business judgment, that the price is
adequate, the sale in good faith to an unrelated buyer (an arms' length
transaction) and that the notice of sale was reasonable under the
circumstances. Court will also waive the FRBP 6004(g) stay of the sale
order.