

  
Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
January 29, 2021

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No. 20-13031-mkn
	)	
ALFONSO NIETO dba AL'S BREAD	)	Chapter 13
CORPORATION,	)	
	)	
Debtor.	)	
ALFONSO NIETO,	)	Adv. Proc. No. 20-01097-mkn
	)	
Plaintiff,	)	
v.	)	
	)	Date: December 9, 2020
SANAM LIMITED; FRANKLIN CREDIT	)	Time: 9:30 a.m.
MANAGEMENT CORPORATION;	)	
DEUTSCHE BANK NATIONAL TRUST	)	
COMPANY, AS CERTIFICATE	)	
TRUSTEE ON BEHALF OF BOSCO	)	
CREDIT II TRUST SERIES 2010-1;	)	
SABLES, LLC,	)	
	)	
Defendants.	)	

**ORDER ON DEFENDANTS' MOTION TO DISMISS  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT<sup>1</sup>**

<sup>1</sup> In this Order, all references to "ECF No." are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references of "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil

1 On December 9, 2020, the court heard the Defendants’ Motion to Dismiss or in the  
2 Alternative for Summary Judgment (“Dismissal Motion”), brought on behalf of defendants  
3 Franklin Credit Management Corporation, Deutsche Bank National Trust Company, as  
4 certificate trustee on behalf of Bosco Credit II Trust Series 2010-1, and Sables, LLC. The  
5 appearances of counsel were noted on the record. After arguments were presented, the matter  
6 was taken under submission.

7 **BACKGROUND<sup>2</sup>**

8 On June 24, 2020, Alfonso Nieto, dba Al’s Bread Corporation (“Debtor”) filed a  
9 voluntary Chapter 13 petition along with his schedules of assets and liabilities (“Schedules”) and  
10 statement of financial affairs (“SOFA”). (ECF No. 1). In his property Schedule “A/B,” Debtor  
11 listed himself as the owner of real property located at 6033 Watermelon Street, North Las Vegas,  
12 NV 89081 (“Property”). On the same day, Debtor filed his proposed Chapter 13 Plan #1 (ECF  
13 No. 2), which listed the Property as his primary residence. An initial hearing on confirmation of  
14 the proposed plan (“Plan”) was noticed to be held on September 3, 2020. (ECF No. 8). On the  
15 same date, a Notice of Chapter 13 Bankruptcy Case (“Bankruptcy Notice”) was issued (ECF No.  
16 6) setting forth a deadline of September 28, 2020, for interested parties to object to the Debtor’s  
17 Chapter 13 discharge or to object to the dischargeability of a particular debt. The Bankruptcy  
18 Notice also advised that Rick A. Yarnall is the Chapter 13 trustee (“Trustee”) assigned to  
19 administer the case.

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23 Procedure. All references to “FRE” are to the Federal Rules of Evidence. All references to  
24 “NRS” are to the Nevada Revised Statutes.

25 <sup>2</sup> Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the  
26 docket in the above-captioned adversary proceeding and the above-captioned Bankruptcy Case  
27 See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04,  
28 Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015)  
 (“The Court may consider the records in this case, the underlying bankruptcy case and public  
records.”).

1 On July 29, 2020, the Trustee filed an opposition to confirmation of the proposed Chapter  
2 13 plan combined with a recommendation that the case be dismissed. (ECF No. 16).<sup>3</sup>

3 On August 17, 2020, Debtor filed a complaint commencing the above-captioned  
4 adversary proceeding (“Adversary Complaint”), naming as defendants Sanam Limited  
5 (“Sanam”), Franklin Credit Management Corporation (“Franklin Credit”), Deutsche Bank  
6 National Trust Company (“Deutsche Bank”) as certificate trustee on behalf of Bosco Credit II  
7 Trust Series 2010-1 (“Bosco”), and Sables, LLC (“Sables”). (AECF No. 1). The complaint  
8 identifies Bosco as the former beneficiary of a second deed of trust against the Property securing  
9 a loan obtained by the Debtor, with Deutsche Bank as the registered agent of Bosco. The  
10 complaint further identifies Franklin Credit as the servicer of the loan held by Bosco. The  
11 complaint further identifies Sables as the duly appointed trustee retained by Franklin Credit to  
12 conduct a foreclosure sale on the Property. The complaint further identifies Sanam as the  
13 purchaser of the Property through a foreclosure sale held on May 21, 2020, i.e., prior to the filing  
14 of the Chapter 13 petition, resulting from the Debtor’s prior default on the subject loan. See  
15 Adversary Complaint at ¶¶ 8-40.<sup>4</sup> The complaint alleges that after the Chapter 13 petition was  
16 filed, Sanam commenced efforts to evict the Debtor from the Property without obtaining relief  
17 from the automatic stay. The complaint is framed as six “counts” including a request for  
18 damages under Section 362(k) (“Count One”),<sup>5</sup> in addition to claims under the Fair Debt

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20 <sup>3</sup> As a result of numerous continuances, as of the hearing on the instant Dismissal  
21 Motion, the plan confirmation hearing is scheduled to be held on January 21, 2021. (ECF No.  
22 23).

22 <sup>4</sup> Although the Debtor alleges that the Property was the subject of a foreclosure sale  
23 conducted on May 21, 2020, he does not disclose that foreclosure sale in Part 4 of his SOFA at  
24 Item 10.

24 <sup>5</sup> Section 362(k) provides in pertinent part that “an individual injured by any willful  
25 violation of a stay provided by this section shall recover actual damages, including costs and  
26 attorney’s fees, and, in appropriate circumstances, may recover punitive damages.” Once a creditor  
27 is aware a debtor has filed for bankruptcy, any intentional actions taken by the creditor which  
28 violate the stay are considered willful for the purposes of Section 362(k), regardless of the  
creditor’s belief that it had a right to the property. See In re Achterberg, 573 B.R. 819, 831 (Bankr.  
E.D. Cal. 2017) (“Once the creditor learns or has notice of a bankruptcy case having been filed,  
any actions that it intentionally undertakes are deemed willful [. . .] [w]hether the party believes

1 Collection Practices Act (“Count Three”), and provisions of Nevada law “Counts Two, Four,  
2 Five, and Six”).<sup>6</sup> The complaint specifies that Count One and Count Two are asserted only  
3 against defendant Sanam, Counts Three, Four, and Five are asserted only against defendant  
4 Franklin Credit, and Count Six is asserted only against defendants Sanam and Sables.<sup>7</sup>

5 On October 19, 2020, Defendants Franklin Credit, Deutsche Bank, and Sables  
6 (collectively, “Defendants”) filed the instant Dismissal Motion. (AECF No. 11). The Dismissal  
7 Motion was noticed to be heard on November 25, 2020. (AECF No. 12).

8 On November 11, 2020, Debtor filed his opposition (“Opposition”) to the Dismissal  
9 Motion. (AECF No. 15). In his response, Debtor concedes that he does not oppose dismissal of  
10 claims Three, Four, and Six. See Opposition at 15:11-12.

11 On November 19, 2020, Defendants filed a reply in support of the Dismissal Motion.  
12 (AECF No. 16). Because the Debtor does not oppose dismissal of Counts Three, Four and Six,  
13 Defendants seek relief as to Count Five. That count is asserted only as to defendant Franklin  
14 Credit and alleges that Franklin Credit failed to post at the Property in a conspicuous place, a  
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19 in good faith that it had a right to the property is not relevant to whether the act was “willful” or  
20 whether compensation must be awarded.”).

21 <sup>6</sup> Claims and causes of action that arose before the commencement of the Debtor’s  
22 bankruptcy case are legal interests constituting property of the estate under Section 541(a)(1).  
23 See Sierra Switchboard Co. v. Westinghouse Electric Corp., 789 F.2d 705, 707 (9th Cir. 1986).  
24 Debtor did not list any claims against third parties on his property Schedule A/B at Item 33, but  
25 likely would not be barred by the doctrine of judicial estoppel from amending his schedules in  
26 this Chapter 13 proceeding. Compare Michael v. State Farm Fire & Cas. Co., 2019 WL 1960268  
(D.Nev. May 2, 2019)(to avoid dismissal by judicial estoppel, former Chapter 7 debtor given  
opportunity to reopen bankruptcy case to list estate property that was the subject of an insurance  
claim pursued after discharge).

27 <sup>7</sup> Deutsche Bank and Bosco are not specified with respect to any of the counts alleged in  
28 the adversary complaint, but the prayer of the complaint includes a request for injunctive relief  
against all Defendants, apparently including Deutsche Bank and Bosco.

1 copy of a notice of default and election to sell (“NOD”), as required by NRS 107.07.<sup>8</sup> See  
2 Adversary Complaint at ¶¶ 80, 81, and 82.

3 **DISCUSSION**

4 The instant Dismissal Motion apparently is brought under Civil Rule 12(b)(6),<sup>9</sup> asserting  
5 that the Debtor’s complaint fails to state a claim for which relief may be granted.<sup>10</sup> To the extent  
6 the motion is based on matters outside of the adversary complaint, it must be treated as a request  
7 under Civil Rule 56 for summary judgment. See FED.R.CIV. P. 12(d). Summary judgment is  
8 appropriate only where the moving party demonstrates that there is no genuine dispute as to a  
9 material fact that the party is entitled to judgment as a matter of law. See FED.R.CIV. P. 56(a).

10 The court having considered the Dismissal Motion, along with the materials submitted,  
11 and the written and oral arguments of counsel, concludes that the motion must be denied.  
12 Several reasons support this conclusion.

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16 <sup>8</sup> NRS 107.087 states, in pertinent part, as follows: “1. In addition to the requirements of  
17 NRS 107.080, if the sale of property is a residential foreclosure, a copy of the notice of default  
and election to sell and the notice of sale must:

- 18 (a) Be posted in a conspicuous place on the property not later than:  
19 (1) For a notice of default and election to sell, 100 days before the  
date of sale; or  
20 (2) For a notice of sale, 15 days before the date of sale. ...”

21 <sup>9</sup> For some reason, Defendants refer to the Nevada Rules of Civil Procedure which do not  
apply in federal civil proceedings. See, e.g., Dismissal Motion at 4:24 to 5:26. The court treats  
22 the instant motion, however, as having been brought under Civil Rule 12(b)(6).

23 <sup>10</sup> The standard for dismissing a claim under this rule is whether the complaint alleges  
24 sufficient factual matter to state a claim for relief that is plausible on its face. See Ashcroft v.  
Iqbal, 129 S.Ct. 1937, 1949 (2009). In considering a motion under Civil Rule 12(b)(6), the court  
25 accepts as true all factual allegations made by, and draws all reasonable inferences in favor of,  
the plaintiff. See Barnes v. Belice (In re Belice), 461 B.R. 564, 573 (9th Cir. BAP 2011).  
26 Dismissal is appropriate if there is “a lack of a cognizable legal theory or the absence of  
27 sufficient facts alleged under a cognizable legal theory.” Id. This pleading standard applies to  
“all civil actions.” Ashcroft, 129 S.Ct. at 1953. This rule, which is incorporated by Bankruptcy  
28 Rule 7012, applies in bankruptcy proceedings.

1 First, the Adversary Complaint includes eight attachments marked as Exhibits “A”  
 2 through “H.” The Dismissal Motion includes a declaration<sup>11</sup> attached Exhibit “1” to which is  
 3 attached five additional exhibits marked as Exhibits “A” through “E.” The Opposition filed by  
 4 the Debtor includes three declarations as Exhibits “A” through “C,” to which are attached several  
 5 other exhibits.<sup>12</sup> On its face, the parties have gone far beyond the matters alleged in or attached  
 6 to the Adversary Complaint, requiring the Dismissal Motion to be treated under the standards for  
 7 summary judgment.

8 Second, because the claims alleged in the Adversary Complaint are not wholly dependent  
 9 on the Debtor’s legal interest in the Property on the petition date, he had standing to pursue the  
 10 claims and the court has jurisdiction to adjudicate the claims. As there is no dispute that the  
 11 Debtor was still in possession of the Property on the petition date, his possessory interest was  
 12 sufficient to warrant protection of the automatic stay. See generally Superior Propane v. Zartun  
 13 (In re Zartun), 30 B.R. 543, 545 (B.A.P. 9th Cir. 1983). See also In re Sullivan, 551 B.R. 868  
 14 (Bankr. D. Mass. 2016)(“While the bank is correct that foreclosure and sale to a third party  
 15 removes real property from the bankruptcy estate so that the automatic stay would not apply to  
 16 actions with respect to such property, an attempt to deprive a debtor of her possessory interest in  
 17 the property (even an allegedly wrongful one) remains subject to the stay.”); In re Castle Serv.,  
 18 LLC, 560 B.R. 587, 590 (Bankr. D. Utah 2016)(“The weight of bankruptcy authority also holds  
 19 that a “mere possessory interest in real property, without any accompanying legal interest, is  
 20 sufficient to trigger the protection of the automatic stay.”) (external citations omitted).<sup>13</sup>

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 22 <sup>11</sup> The declaration is from Marcy Axelrod (“Axelrod Declaration”) who is a custodian of  
 23 records for defendant Sables.

24 <sup>12</sup> The declarations are from Debtor’s counsel, the Debtor’s wife (“Mary Joe  
 25 Declaration”) and the Debtor (“Nieto Declaration”).

26 <sup>13</sup> As the eviction proceeding apparently was commenced after the Chapter 13 petition  
 27 was filed, there would be no continuation of an eviction or unlawful detainer action to trigger the  
 28 exception under Section 362(b)(22). Moreover, because there is no allegation as to the existence  
 of a lease or rental agreement, the threshold requirement for the automatic stay exception under  
 Section 362(b)(23) would not apply.

1 Third, Count Five specifically alleges that Franklin Credit failed to comply with NRS  
2 107.087, resulting in an invalid foreclosure of the Property prior to the commencement of the  
3 Chapter 13 proceeding. Debtor seeks damages and attorneys' fees. The claim under Nevada  
4 law, if any, arose prior to the petition date and is a legal interest that is not dependent on  
5 Debtor's possession of the Property on the petition date.<sup>14</sup> In other words, even if legal title to  
6 the Property on the petition date is required for the Debtor's claim under Section 362(k), the  
7 absence of legal title would not preclude the Debtor from asserting a claim under NRS 107.087.

8 Fourth, Count Five incorporates by reference all preceding factual allegations set forth in  
9 the adversary complaint. Those factual allegations include that the Debtor purchased the  
10 Property in June 2006, that the NOD was filed on October 18, 2019, that a Notice of Sale was  
11 filed on February 13, 2020, that the Property was sold by foreclosure to Sanam on May 21, 2020,  
12 that Franklin Credit (as servicer of the underlying loan) failed to comply with NRS 107.087, and  
13 that Debtor suffered damages as a result. Accepting these factual allegations as true for purposes  
14 of Civil Rule 12(b)(6), they are sufficient to state a plausible basis for a claim for relief under the  
15 subject statute.

16 Finally, a material factual dispute exists over whether the NOD and Notice of Sale were  
17 posted in compliance with Nevada law. Defendants maintain that the NOD was conspicuously  
18 posted at the Property in compliance with NRS 107.087 as demonstrated by Exhibits "A" and  
19 "D." See Axlerod Declaration at ¶¶9, 10, 14, and 15. Exhibit "A" is an Affidavit of Service  
20 executed by Kevin Dunn, NV License #1711, dated October 25, 2019. It attests that he  
21 personally posted "a copy of the Danger Notice and Promissory Note" on the Property at  
22 approximately 1:12 PM. It also represents that he "personally posted a copy of the Notice of  
23 Default on the property...in a conspicuous place." A photograph accompanies the affidavit  
24 depicting two pages taped to one door and one page taped to another door. Exhibit "D" is an  
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26 <sup>14</sup> Nevada law does not appear to provide a redemption period under NRS 107.080(5) that  
27 might be extended under Section 108(b). Whether a violation of NRS 107.087 would give rise to  
28 a legal or equitable restitutionary remedy, separate from an award of damages, has not been  
raised.



1 Affidavit of Service executed by Devin Dunn, NV License #1711, dated February 14, 2020. It  
2 attests that on February 14, 2020, he personally posted a copy of “the Notice of Sale, as well as a  
3 copy of the Notice to Tenants of the Property” at a conspicuous place on the Property. A  
4 photograph accompanies the affidavit depicting two pages taped to one door. These  
5 representations from the process servers employed by the Defendants, however, are contradicted  
6 by the testimony of the Debtor and his non-debtor spouse. Both Debtor witnesses attest that they  
7 have no recollection of seeing the NOD, or any similar document, posted on the Property on  
8 October 25, 2019, nor a Notice of Sale posted on the Property on February 14, 2020. See Mary  
9 Joe Declaration at ¶¶ 7, 9, and 11; Nieto Declaration at ¶¶ 17, 19, and 21. Although the absence  
10 of recollection of the Debtor and his spouse ultimately may be given little weight at trial, the  
11 testimony is sufficient to create a genuine dispute of whether a NOD, or a Notice of Sale, in fact  
12 were posted conspicuously at the Property in compliance with NRS 107.087.<sup>15</sup>

13 **IT IS THEREFORE ORDERED** that the Defendants’ Motion to Dismiss or in the  
14 Alternative for Summary Judgment, brought on behalf of defendants Franklin Credit  
15 Management Corporation, Deutsche Bank National Trust Company, as certificate trustee on  
16 behalf of Bosco Credit II Trust Series 2010-1, and Sables, LLC., Adversary Docket No. 11, be,  
17 and the same hereby is, **DENIED**.

18  
19 Copies sent via CM/ECF ELECTRONIC FILING

20 Copy sent via BNC to:

21 ALFONSO NIETO  
22 6033 WATERMELON ST  
23 NORTH LAS VEGAS, NV 89081

24 <sup>15</sup> At oral argument, Defendants asserted that the Debtor provided “no evidence” to  
25 dispute the content of the affidavits of service because the Mary Joe Declaration and Nieto  
26 Declaration merely attested that they do not recall seeing the NOD or Notice of Sale posted on  
27 the Property. The testimony contained in the Debtor’s declarations as well as in the Defendants’  
28 affidavits of service, however, is relevant to determining whether the items actually were posted  
on the Property. Defendants’ assertion is simply incorrect. Evidence has been presented by all  
parties to this dispute, but the credibility of witnesses is ill-suited to determination on summary  
judgment. See Fogel Legware, etc. v. Wills (In re Wills), 243 B.R. 58, 65 (B.A.P. 9th Cir.  
1999); Plise v. Krohn (In re Plise), 719 Fed.Appx. 622, 625 (9th Cir. 2018).



1 SANAM LIMITED  
2 2218 BUCCENEER BOULEVARD  
3 HENDERSON, NV 89074

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