

NOT FOR PUBLICATION

FILED & ENTERED

AUG 14 2015

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
BY Ogier DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re:

ALLANA BARONI,

Reorganized Debtor.

Case No.: 1:12-bk-10986-MB

Chapter 11

Adv. Proc. No. 1:13-ap-01249-MB

ALLANA BARONI,

Plaintiff,

vs.

ONEWEST BANK, FSB,

Defendant.

**MEMORANDUM OF DECISION:  
(1) STRIKING UNAUTHORIZED FIRST  
AMENDED COMPLAINT AND SETTING  
ASIDE DEFAULTS, AND (2) DENYING  
AS MOOT PLAINTIFF'S MOTION FOR  
DEFAULT JUDGMENT AGAINST  
NATIONWIDE TITLE CLEARING, INC.  
AND MERIDIAN FORECLOSURE  
SERVICE dba MTDS, INC. dba  
MERIDIAN TRUST DEED SERVICES  
UNDER FIRST AMENDED COMPLAINT**

Hearing

Date: July 30, 2015

Time: 11:00 a.m.

Place: Courtroom 303

21041 Burbank Blvd

Woodland Hills, CA 91367

MEMORANDUM OF DECISION

ONEWEST BANK, FSB,  
  
Counterclaimant,  
  
vs.  
  
ALLANA BARONI,  
  
Counterdefendant.

On July 30, 2015, before the undersigned United States Bankruptcy Judge, the Court held (i) a hearing on *Plaintiff's Motion to Enter Default Judgment on FAC against Nationwide Title Clearing & Meridian Foreclosure Service* ("Motion"), Adv. Dkt. 200.<sup>12</sup> Louis J. Esbin and Michael Riley appeared on behalf of Plaintiff Allana Baroni ("Baroni"). Brian J. Newman appeared on behalf of Defendant OneWest Bank, F.S.B. ("OWB"). Gary Klausner appeared on behalf of defendant Nationwide Title Clearing, Inc. ("NTC").

In respect of the Motion, the Court considered the papers filed by Baroni and OWB, and the arguments of their respective counsel. The Court, however, specifically disregarded the papers filed by NTC and did not permit counsel for NTC to speak to the merits of the Motion at the hearing, because the entry of a default generally cuts off a defendant's right to appear in an action. *See Transamerica Life Ins. Co. v. Shubin*, 2012 U.S. Dist. LEXIS 157131, \*4 (E.D. Cal. Oct. 31, 2012).<sup>3</sup> At the conclusion of the hearing, the Court continued the hearing and indicated that the

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<sup>1</sup> "Adv. Dkt." refers to the docket in this adversary proceeding.

<sup>2</sup> Baroni filed her Motion on July 9, 2015. Because the Amended Scheduling Order (as defined below) in this proceeding requires all pretrial motions to be filed no later than October 31, 2014, the Motion is untimely. However, for the reasons stated in the *Memorandum of Decision Denying Plaintiff's Motion to Strike Summary Judgment Motion by OneWest Bank on Counterclaim* filed concurrently herewith, this Court finds good cause exists to further amend the Amended Scheduling Order. As such, the Court will consider this Motion to be timely filed.

<sup>3</sup> *See also Clifton v. Tomb*, 21 F.2d 893, 897 (4<sup>th</sup> Cir. 1927); *Great Am. Ins. Co. v. M.J. Menefee Constr., Inc.*, 2006 U.S. Dist. LEXIS 64902 (E.D. Cal. Aug. 29, 2006); *Cohen v. Murphy*, 2004

(Continued...)

1 Court would further review the record in light of the parties' arguments.

2 The Court has completed that review and now files this Memorandum of Decision. This  
3 memorandum constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052  
4 of the Federal Rules of Bankruptcy Procedure. The Court concludes below that the *First Amended*  
5 *Complaint* ("FAC"), which purports to add Nationwide Title Clearing, Inc. ("NTC") and Meridian  
6 Foreclosure Service, dba MTDS, Inc. dba Meridian Trust Deed Services ("MFS") as defendants,  
7 should be stricken and the defaults entered under the FAC set aside.<sup>4</sup> These determinations render  
8 moot the pending Motion, which seeks a default judgment on the FAC against NTC and MFS.

9  
10 **I.**

11 **FACTUAL AND PROCEDURAL BACKGROUND**

12 Plaintiff Allana Baroni commenced this bankruptcy case on February 1, 2012. Case Dkt.  
13 1.<sup>5</sup> The case originally was filed under chapter 13 of the Bankruptcy Code, but subsequently was  
14 converted to chapter 11. Case Dkt. 10, 17. Defendant OWB filed a proof of claim on or about  
15 March 27, 2012, in an amount in excess of \$1.8 million, asserting a secured claim against Baroni  
16 and certain real estate in which she holds an interest. *See* Claim No. 3-1. Baroni disputes the claim  
17 filed by OWB, arguing that OWB does not own, and otherwise is not entitled, to enforce the  
18 promissory note and deed of trust (the "Note" and "Deed of Trust") on which the claim is  
19 premised.

20 On April 15, 2013, the Court confirmed the chapter 11 plan proposed by Baroni (the  
21 "Plan"), over the objection of OWB. Case Dkt. 423. The Plan contemplates, *inter alia*, that Baroni

22 \_\_\_\_\_  
23 (...Continued)

24 U.S. Dist. LEXIS 25284 (N.D. Cal. April 20, 2004); *Newhouse v. Probert*, 608 F. Supp. 978, 985  
(D. Mich. 1985); *In re Uranium Antitrust Litigation*, 473 F. Supp. 382, 386 (N.D. Ill. 1979).

25 <sup>4</sup> Pursuant to a prior order of the Court, the default entered against OWB under the FAC was set  
26 aside. Adv. Dkt. 172.

27 <sup>5</sup> "Case Dkt." Refers to the docket in the above-referenced chapter 11 case.

1 would file a post-confirmation adversary proceeding disputing the OWB claim and, pending a final  
2 adjudication of that dispute, make plan payments into a reserve account. Case Dkt. 376 at 22-24.  
3 If OWB is successful in that litigation, OWB will be entitled under the Plan to the amounts  
4 deposited into the reserve account and future monthly payments required by the Plan. If Baroni is  
5 successful, any reserved amounts in respect of the OWB claim, to which OWB is determined not  
6 entitled, will revert to Baroni.

7 On November 15, 2013, Baroni filed her complaint against OWB (the “Complaint”),  
8 commencing this adversary proceeding. Adv. Dkt. 1. The Complaint alleges six different claims  
9 for relief, but the gravamen of the Complaint is that OWB is not the holder of the Note and  
10 Security Agreement and is not otherwise entitled to enforce and collect the secured debt created  
11 under those instruments. On January 17, 2014, OWB filed an answer to the Complaint (the  
12 “Answer”) and a counterclaim (the “Counterclaim”) seeking a declaratory judgment that OWB (i)  
13 may enforce the Note and Security Agreement and (ii) holds an allowed secured claim under the  
14 Bankruptcy Code based on those instruments. Adv. Dkt. 15, 16.

15 On January 29, 2014, the Court entered a scheduling order setting a status conference for  
16 August 27, 2014 and various deadlines. Adv. Dkt. 18. Among other things, the scheduling order  
17 provided the following: “The last day to join other parties and to amend pleadings is (*specify date*):  
18 **07/31/2014**”. *Id.* at 2. On July 18, 2014, the Court entered its *Order Approving Joint Stipulation*  
19 *Amending Scheduling Order*, which stated “The last day to join other parties and to amend  
20 pleadings is **October 31, 2014**” (“Amended Scheduling Order”). Adv. Dkt. 43 at 2.

21 On October 1, 2014, OWB filed its *Motion for Summary Judgment or, in the Alternative,*  
22 *Summary Adjudication with Respect to Adversary Complaint* (“MSJ”). Adv. Dkt. 59. The MSJ  
23 sought summary judgment in favor of OWB on all of the counts in the Complaint. On October 29,  
24 2014, Baroni filed her opposition to the MSJ. Dkt. 102. Two days later, before the briefing on the  
25 MSJ had been completed, Baroni filed her FAC, asserting additional causes of action against OWB  
26 and naming two new defendants: NTC and MFS. Baroni neither sought nor obtained leave of the  
27 Court to file the FAC.

1 In a supplemental opposition filed on November 8, 2014, Baroni argued that the FAC was  
2 properly filed without leave of Court and that the original complaint was rendered a nullity. Adv.  
3 Dkt. 108. Based on this premise, Baroni argued that the Court should not go forward with its  
4 consideration of the pending MSJ. In a written response filed November 10, 2014, OWB argued  
5 the contrary position, i.e., that the FAC was unauthorized and its filing was therefore of no  
6 consequence to the pending MSJ. On November 19, 2014, the Court held a hearing on the MSJ  
7 before the Honorable Alan M. Ahart.

8 The dispute between the parties regarding the status of the FAC centered on whether the  
9 language in the Amended Scheduling Order setting deadlines for the amendment of pleadings and  
10 the joinder of parties somehow waived the requirement under Rule 15(a)(2) of the Federal Rules of  
11 Civil Procedure that Plaintiff obtain the opposing party's written consent or leave of Court. In its  
12 December 4, 2014 order granting all relief requested in the MSJ on the original Complaint (the  
13 "MSJ Order"), the Court specifically addressed this issue:

14 12. Further, the First Amended Complaint ("FAC") filed  
15 by Plaintiff on 10/31/14, which added two more claims (claim  
16 no. 7 for violation Cal. Civ. Code § 2924 and claim no. 8 for  
17 Slander of Title) and two more defendants (Nationwide Title  
18 Clearing and Meridian Foreclosure Services) is futile, as it  
19 stems from the same legal theory that Movant does not own  
20 Baroni's loan. The new allegations in the FAC are not material  
21 to the instant Motion for Summary Judgment; FAC did not  
22 present any allegations which could raise a genuine issue of  
23 material fact with respect to the basis for the instant Motion for  
24 Summary Judgment, thus this Court will grant this Motion for  
25 Summary Judgment without permitting the Movant to respond  
26 in light of FAC. [*Reflectone, Inc. v. Farrand Optical Co.*, 862  
27 F.2d 841 (11th Cir. 1989)]. Additionally, the Joint Stipulation  
28 Amending Scheduling Order did not waive the requirement of  
FRCP 15(a)(2) of obtaining opposing party's written consent or  
the court's leave before amending the pleadings. The Order  
Approving Joint Stipulation Amending Scheduling Order  
simply fixes a deadline to amend the pleadings; it does not  
approve the amendment of any pleadings.

1 Adv. Dkt. 129 at 4. In other words, the Court expressly held in the MSJ Order that the Amended  
2 Scheduling Order did not permit the filing of the FAC without the opposing party's consent or  
3 leave of Court, neither of which were obtained before Baroni filed the FAC. Notwithstanding this  
4 ruling, Baroni thereafter requested that the Clerk of the Court enter defaults under the FAC against  
5 OWB, NTC and MFS. Adv. Dkt. 135, 136, 137. On January 2, 2015, the Clerk entered notices of  
6 default against all three defendants under the FAC.

7 On December 15, 2014, Baroni filed a Notice of Appeal from the MSJ Order granting  
8 judgment for OWB under the original Complaint. Adv. Dkt. 132. OWB elected to have the appeal  
9 heard by the District Court, Adv. Dkt. 143, which ultimately dismissed Baroni's appeal by order  
10 dated March 2, 2015. Adv. Dkt. 216. The District Court concluded that the MSJ Order was not  
11 final because the Counterclaim was still pending. *Id.*

12 While Baroni's appeal of the MSJ Order under the original Complaint was pending, OWB  
13 filed its *Motion to Set Aside Entry of Default Against OneWest Bank* with respect to the FAC. Adv.  
14 Dkt. 152. The Court, before the Honorable Maureen A. Tighe, held a hearing on OWB's motion  
15 on February 11, 2015. In a written ruling, the Court held that entry of the default against OWB was  
16 not appropriate because the FAC was not authorized and admonished Baroni for her  
17 gamesmanship:

18 The Default is contrary to both the spirit and specific language  
19 of the MSJ Order. . . the MSJ Order ruled that the FAC was not  
20 timely as the Joint Stipulation did not waive the Rule 15(a)(2)  
21 requirement that the Debtor obtain opposing party consent or a  
22 court order prior to filing an amended complaint. . . . The  
23 Debtor will not be prejudiced by this adversary being  
24 determined on its merits, rather than by the game of 'gotchya'  
25 that the Debtor is trying to play.  
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1 Adv. Dkt. 168.<sup>6</sup> The Court concluded that the default against OWB under the FAC should be set  
2 aside. *Id.* at 3-4. On February 23, 2015, the Court entered its order setting aside the default entered  
3 against OWB on the FAC. Adv. Dkt. 172.

4 On July 9, 2015, Baroni filed the instant Motion, requesting that the Court enter a default  
5 judgment against NTC and MFS pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure,  
6 made applicable to this adversary proceeding by Rule 7055 of the Federal Rules of Bankruptcy  
7 Procedure.

## 8 II.

### 9 APPLICABLE LAW

10 Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, which are applicable to this  
11 adversary proceeding pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure, a  
12 “party may amend its pleading once as a matter of course within (A) 21 days after serving it, or (B)  
13 if the pleading is one to which a responsive pleading is required, 21 days after service of a  
14 responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is  
15 earlier.” Fed. R. Civ. P. 15(a)(1). “In all other cases, a party may amend its pleading only with the  
16 opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2).

17 “If an amended pleading cannot be made as of right and is filed without leave of court or  
18 consent of the opposing party, the amended pleading is a nullity and without legal effect.” *Hardin*  
19 *v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 1167, 1181 (E.D. Cal. 2011) (citing *United States ex rel.*  
20 *Mathews v. HealthSouth Corp.*, 332 F.3d 293, 296 (5th Cir. 2003)); *see also Murray v. Archambo*,  
21 132 F.3d 609, 612 (10th Cir. 1998); *Hoover v. Blue Cross and Blue Shield of Alabama*, 855 F.2d  
22 1538, 1544 (11th Cir. 1988). It is appropriate in such a circumstance for the Court to strike the  
23 unauthorized pleading. *Hardin v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d at 1181.

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26 <sup>6</sup> Although this document is titled *Notice of Tentative Ruling Re Motion To Set Aside Entry of*  
27 *Default Against One West Bank*, the text of the document makes clear that the Court is adopting its  
28 tentative ruling as its final ruling. *See* Adv. Dkt. 168 at 1.

1 Likewise, under Rule 21 of the Federal Rules of Civil Procedure, the addition or the  
2 dropping of a party to a complaint requires an order of the Court. *See* Fed. R. Civ. P. 21 (made  
3 applicable pursuant to Fed. R. Bankr. P. 7021); *Hoffman v. Beer Drivers & Salesmen's Local*  
4 *Union No. 888*, 536 F.2d 1268, 1272 (9th Cir. 1976) (“When a party is added in an on-going  
5 lawsuit, the approval of the court is required by Rule 21 in order to protect the parties already in the  
6 case whose rights might be seriously affected by the addition of a new party defendant.”); *see also*  
7 *Madery v. Int'l Sound Technicians, Local 695*, 79 F.R.D. 154, 156 (C.D. Cal. 1978).

8 Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, which is applicable to this  
9 adversary proceeding pursuant to Rule 7016 of the Federal Rules of Bankruptcy Procedure, the  
10 Court is required to issue a scheduling order in an adversary proceeding. The scheduling order  
11 “must limit the time to join other parties, amend the pleadings, complete discovery, and file  
12 motions.” Fed. R. Civ. P. 16(b).

### 13 III.

### 14 ANALYSIS

15 Baroni does not contend that the FAC, which added causes of action and additional  
16 defendants, was filed as a matter of right under Rule 15(a)(1). Moreover, Baroni does not contend  
17 that she sought and obtained leave of Court to file the FAC under Rule 15(a)(2). Baroni contends  
18 instead that the language in the Scheduling Order and Amended Scheduling Order establishing  
19 deadlines for “[t]he last day to join other parties and to amend pleadings” somehow constituted  
20 OWB’s written consent to file the FAC or otherwise suspended the requirement of an order  
21 granting leave under Rules 15(a)(2) and 21(a).

22 There is nothing in the scheduling orders or in any other part of the record to sustain  
23 Baroni’s argument. The scheduling orders set a deadline for the joinder of parties and amendment  
24 of pleadings, as required by Rule 16(b) – period. Nothing in those orders addresses, let alone  
25 alters, the legal prerequisites for properly doing so. This is precisely what the Court (through  
26 Judge Ahart) concluded in the MSJ Order. Baroni has presented no adequate explanation for her  
27 present attempt to obtain a default judgment against NTC and MFS in contravention of the Court’s  
28 prior ruling and no reason to alter that ruling. The FAC is an amended pleading as to which neither



1 written consent nor leave to file were obtained. The FAC is a legal nullity and, accordingly, will be  
2 stricken. *See Hardin v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d at 1181. In turn, the Motion will be  
3 denied as moot because the FAC will be stricken.

4 The Court notes that several of Baroni's statements in connection with the Motion are  
5 demonstrably incorrect and cautions counsel to exercise greater care in the future, keeping in mind  
6 the duties of counsel under Rule 9011 of the Federal Rules of Bankruptcy Procedure and other  
7 applicable law. For instance, in Baroni's reply to the objections of OWB to Baroni's proposed  
8 judgments against NTC and MFS (the "Reply re Judgment"), Adv. Dkt. No. 215 at 8-9, Baroni  
9 states "Plaintiff had consent from OWB and Permission from the Court to File the [FAC]." This is  
10 not correct, and evinces a lack of good faith, in light of (i) Judge Ahart's express ruling on the FAC  
11 in the MSJ Order and (ii) Judge Tighe's admonition of Baroni, in light of Judge Ahart's ruling,  
12 regarding Baroni's attempt to obtain a default judgment under the FAC.

13 Likewise, the representations of counsel on behalf of Baroni in the Motion, the Reply re  
14 Judgment, and at the hearing on the Motion, that Judge Tighe authorized Plaintiff to proceed with  
15 default proceedings against NTC and MFS are equally incorrect. *See* Adv. Dkt. 200 at 4:17-19,  
16 Adv. Dkt. 215 at 1:26-28, 2:16-18, 7:13-14. The Court has reviewed the record of the hearing held  
17 by Judge Tighe on February 11, 2015, the written findings adopted by Judge Tighe on OWB's  
18 motion to set aside the default entered against it, and the order entered by Judge Tighe on that  
19 motion. Nothing in the record substantiates Baroni's contention.

20 The only motion before Judge Tighe on February 11, 2015, was OWB's motion to set aside  
21 the default. The record of the hearing indicates that following the arguments of counsel, Judge  
22 Tighe announced her decision to grant that OWB's motion and discussed with the parties  
23 appropriate provisions for an order, particularly in light of the pending appeal of the MSJ Order.  
24 At the very end of the hearing, following the discussion of the order, Baroni's counsel, Mr. Espin,  
25 asked whether the order was "only as to OneWest?" Judge Tighe responded: "As to OneWest  
26 only, nobody else has come in." That's it.

27 The Court finds disingenuous the suggestion that by virtue of this exchange, Judge Tighe  
28 had in any way sanctioned Baroni's continued pursuit of a default judgment against NTC and MFS.

1 Judge Tighe simply responded that the form of order discussed by the parties applied only to OWB,  
2 because OWB was then the only party before the Court seeking relief from a default. Indeed, it is  
3 highly unlikely that Judge Tighe would have approved of Baroni's effort to obtain a default  
4 judgment against NTC and MFS, as it represents the same sort of gamesmanship of which she  
5 expressed disapproval in her written ruling.

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23 Date: August 14, 2015



24 Martin R Barash  
25 United States Bankruptcy Judge  
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