

FILED & ENTERED

JUN 27 2019

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

CURTIS C. MAGLEBY,

Debtor.

Case No. 2:16-bk-15322-RK

Chapter 11

Adv. No. 2:19-ap-01008-RK

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT, RESERVING RULING ON
WHETHER DISMISSAL IS WITH OR
WITHOUT LEAVE TO AMEND,
CONTINUING HEARING ON MOTION AND
STATUS CONFERENCE AND REQUIRING
FURTHER BRIEFING**

CURTIS C. MAGLEBY,

Plaintiff,

vs.

MARCI R. LEVINE, et al.,

Defendants.

Hearing and Status Conference Dates

Old Date: July 2, 2019

Old Time: 2:30 p.m.

New Date: August 14, 2019

New Time: 11:30 a.m.

Courtroom: 1675

Roybal Federal Building

255 East Temple Street

Los Angeles, CA 90012

Pending before the court in this adversary proceeding is the motion of Defendants Marci R. Levine, et al., to dismiss the complaint of Plaintiff Curtis C. Magleby, filed and served on May 20, 2019 and noticed for hearing on July 2, 2019 at

1 2:30 p.m. Defendants in their motion to dismiss contend that the complaint should be
2 dismissed for failure to state a claim upon which relief can be granted pursuant to
3 Federal Rule of Civil Procedure 12(b)(6) and requested that the complaint be dismissed
4 with prejudice. Any written opposition to the motion must have been filed and served on
5 or before June 18, 2019 pursuant to Local Bankruptcy Rule 9013-1(f)(1). Plaintiff did
6 not file a written opposition to the motion by the deadline of June 18, 2019. Instead,
7 Plaintiff filed and served a first amended complaint on June 18, 2019.

8 Pursuant to Local Bankruptcy Rule 9013-1(h), if a party does not timely file and
9 serve documents, such as an opposition to a motion, the court may deem this to be
10 consent to the granting or denial of the motion as the case may be. Also, pursuant to
11 Local Bankruptcy Rule 9013-1(j), the court may decide in its discretion to dispense with
12 oral argument on the motion and rule on the papers without a hearing.

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14 Having reviewed the motion of defendants to dismiss the complaint of plaintiff for
15 failure to state a claim upon which relief can be granted, to which there is no timely
16 written opposition filed and served by the plaintiff, the court exercises its discretion to
17 dispense with oral argument and rules on the motion without a hearing as to whether
18 the motion should be granted and deems the failure of plaintiff to timely oppose the
19 motion as consent to the granting of the motion, which the court determines is well-
20 taken. Because plaintiff's first amended complaint was filed and served on June 18,
21 2019, 29 days after defendants served their motion to dismiss pursuant to Federal Rule
22 of Civil Procedure 12(b)(6), plaintiff may not amend his complaint as of right pursuant to
23 Federal Rule of Civil Procedure 15(a)(1)(B), which requires such amendment within 21
24 days of service of the Rule 12(b) motion, and as some other amendment, plaintiff's first
25 amended complaint is not an authorized amendment that would moot the motion to
26 dismiss the original complaint because such other amendment was permitted only with
27 the opposing party's written consent or the court's leave, which plaintiff does not have,
28 as required by Federal Rule of Civil Procedure 15(a)(2). Accordingly, the court grants

1 defendants' motion to dismiss plaintiff's complaint for failure to state a claim upon which
2 relief can be granted for the reasons stated in the moving papers and for lack of timely
3 written opposition.

4 However, the issue of whether the dismissal should be with or without leave to
5 amend remains. A dismissal for failure to state a claim under Federal Rule of Civil
6 Procedure 12(b)(6) bars further litigation on the particular claim pleaded unless leave to
7 amend is granted, or the dismissal is made without prejudice to refileing the claim. 2
8 Phillips and Stevenson, *Rutter Group Practice Guide: Federal Civil Procedure Before*
9 *Trial, California and Ninth Circuit Edition*, ¶9:285 at 9-113 (2019), *citing*, *Cannon v.*
10 *Loyola University of Chicago*, 784 F.2d 777, 780 (7th Cir. 1986). Because Federal Rule
11 of Civil Procedure 15(a) expressly states that leave to amend "shall be freely given
12 when justice so requires," as a practical matter, leave to amend is almost always
13 granted by the court at least once. *Id.*, ¶¶9:286 and 9:287 at 9-113 and 9-114, *citing*
14 *inter alia*, *United States v. Corinthian Colleges*, 655 F.3d 984, 985 (9th Cir. 2011) and
15 *National Council of La Raza v. Chegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). It is
16 black letter law that the trial court must give at least one chance to amend absent a
17 clear showing that amendment would be futile. *Id.*, ¶9:287 at 9-114, *citing*, *National*
18 *Council of La Raza v. Chegavske*, 800 F.3d at 1041.

19
20 In order for the court to decide whether to dismiss the complaint and adversary
21 proceeding with or without leave to amend, the court believes that it should provide an
22 opportunity for the parties to be heard on this issue. Accordingly, the court orders that
23 the parties file and serve simultaneous briefs on this issue, specifically addressing
24 whether an amendment would be futile, on or before July 17, 2019, and that they may
25 file and serve a reply to each other's brief on the issue on or before July 31, 2019. The
26 court will hear further argument on the motion as to this issue on August 14, 2019 at
27 11:30 a.m. Therefore, the hearing on the motion and the status conference in this
28 adversary proceeding currently set for July 2, 2019 at 2:30 p.m. are continued to August

1 14, 2019 at 11:30 a.m. in Courtroom 1675, Roybal Federal Building, 255 East Temple
2 Street, Los Angeles, California 90012. No appearances are required in this adversary
3 proceeding on July 2, 2019. The court waives the requirement of a joint status report
4 for the continued status conference on August 14, 2019.

5 IT IS SO ORDERED.

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25 Date: June 27, 2019

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27 _____
28 Robert Kwan
United States Bankruptcy Judge