

MAR 13 2014

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. NC-13-1366-JuKiD
)	
6	MICHAEL ALLEN FRATES; CARLA)	Bk. No. 11-70776
	JEAN FRATES,)	
7)	
	Debtors.)	
8	_____)	
)	
9	MICHAEL ALLEN FRATES; CARLA)	
	JEAN FRATES,)	
10)	
	Appellants,)	
11)	O P I N I O N
12	v.)	
)	
13	WELLS FARGO BANK, N.A.; WELLS)	
	FARGO CARD SERVICES,)	
14)	
	Appellees.)	
15	_____)	

Argued and Submitted on February 20, 2014
at San Francisco, California

Filed - March 13, 2014

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding.

Appearances: Michael J. Primus, Esq. argued for appellants
Michael Allen and Carla Jean Frates.

Before: JURY, KIRSCHER, and DUNN, Bankruptcy Judges.

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1 JURY, Bankruptcy Judge:
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3 Chapter 13¹ debtors, Michael Allen Frates and Carla Jean
4 Frates (collectively, Debtors), filed a motion under § 522(f)
5 asking the bankruptcy court to avoid the judicial lien of Wells
6 Fargo Bank, N.A. (Wells Fargo) which encumbered their residence.
7 Wells Fargo failed to respond. Debtors then filed a request for
8 entry of order by default. The bankruptcy court denied their
9 request on procedural grounds: (1) the notice of the motion
10 failed to identify the real property and (2) the notice, motion
11 and accompanying pleadings were not served on counsel listed on
12 the abstract of judgment as required under Cal. Code Civ. P.
13 (CCP) § 684.010. Debtors moved for reconsideration which the
14 court denied. This appeal followed.

15 We conclude that Debtors satisfied the requirements for
16 procedural due process by serving their notice, motion (which
17 identified the real property) and accompanying pleadings on
18 Wells Fargo in compliance with the Federal Rules of Bankruptcy
19 Procedure and the holding in Mullane v. Cent. Hanover Bank &
20 Trust Co., 339 U.S. 306, 314-15 (1950). We also hold that
21 compliance with CCP § 684.010 is not required for lien avoidance
22 motions. Therefore, we REVERSE and REMAND.
23

24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
26 "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure and "Civil Rule" references are to the Federal Rules of
28 Civil Procedure.

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I. FACTS

The facts are undisputed. On October 7, 2013, Debtors filed their chapter 13 petition. In Schedule D, Debtors listed Wells Fargo Card Services as a secured creditor with a judgment lien against their real property in the amount of \$26,200. They also listed the Reese Law Group as an additional notice party in connection with Wells Fargo Card Service's secured claim.

Wells Fargo Card Services filed a proof of claim (POC), which asserted an unsecured credit card debt in the amount of \$19,820.83 and was signed by Janet Samuelson.

Debtors' chapter 13 plan filed with their petition provided:

The Abstract of Judgment recorded on September 12, 2011 by Wells Fargo Bank, N.A. attaching to . . . May Way, San Ramon CA 94583 ("property") will be avoided through a separate motion. For purposes of such motion the property will be valued at \$625,000 and failure of Wells Fargo Bank, N.A. to object will be deemed acceptance of this valuation for purposes of such a motion. This motion will be filed pursuant to 11 U.S.C. 522(f).

The bankruptcy court confirmed the plan in December 2011.

On February 17, 2012, Debtors filed a motion to avoid Wells Fargo's judicial lien. They served Wells Fargo with the notice, motion and other pleadings by mail addressed to the attention of John G. Stumpf, CEO, 101 N. Phillips Avenue, Sioux Falls, SD 57104. They also served these pleadings by mail addressed to Harlan Michael Reese, Esq. of the Reese Law Group, who was listed as the attorney for Wells Fargo on the abstract of judgment attached to Debtors' motion. Neither Wells Fargo nor attorney Reese responded to Debtors' motion.

Debtors filed a request for entry of order by default. The

1 bankruptcy court denied the request without prejudice on
2 substantive grounds: (1) the motion did not provide any
3 information regarding the existence or amounts of the alleged
4 senior deeds of trust, nor did it contain evidence to support
5 the alleged priority of the respective deeds of trust, or the
6 alleged amounts of the liens as of the date of the bankruptcy
7 filing; (2) the motion did not provide evidence regarding
8 exemptions claimed or entitled to be claimed by Debtors; and (3)
9 the docket indicated that Debtors amended their exemptions on
10 March 2, 2012, and those exemptions had not become final.²

11 In May 2013, Debtors filed a second motion to avoid Wells
12 Fargo's judicial lien, the supporting declarations of Carla Jean
13 Frates and Debtors' attorney and a notice. The notice³ stated
14 that Debtors had filed a motion to avoid a judicial lien on real
15 estate in favor of Wells Fargo that was recorded on September
16 12, 2011, and provided the document recordation number. The
17 notice did not contain the address or legal description of the
18 real property subject to Wells Fargo's judicial lien.

19 Debtors served Wells Fargo with the notice, motion and
20 other pleadings by certified mail addressed to the attention of
21

22
23 ² Debtors did not include this motion or the order denying
24 their request for entry of order by default in the record on
25 appeal. However, we take judicial notice of the motion and
26 accompanying declarations, the order, and the certificate of
service, which were docketed and imaged by the bankruptcy court
at Dkt. Nos. 20-23 and 28-32. Atwood v. Chase Manhattan Mortg.
Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

27 ³ The notice was titled as an "Opportunity For Hearing On
28 Motion To Avoid Judicial Lien On Real Estate In Favor Of Wells
Fargo Bank, N.A., A National Banking Association."

1 John G. Stumpf, CEO, 101 N. Phillips Avenue, Sioux Falls, SD
2 57104. Debtors also served Wells Fargo Card Services with the
3 notice, motion and other pleadings by mail addressed to the
4 attention of Janet Samuelson (who signed the POC on behalf of
5 Wells Fargo Card Services), Recovery Department, P.O. Box 9210,
6 Des Moines, IA 50306. However, this time they did not serve
7 attorney Reese with the motion or other pleadings. It is not
8 apparent from the record why they did not do so. In connection
9 with the certificate of service, Sharon Sonsteng, an employee at
10 Debtors' attorney's office, declared that she obtained the
11 address for Wells Fargo through the FDIC website and the address
12 for Wells Fargo Card Services from the POC filed on October 13,
13 2011.

14 Again, Wells Fargo did not respond and Debtors submitted a
15 request for entry of order by default. Debtors served Wells
16 Fargo and Wells Fargo Card Services with the request by mail at
17 the same addresses mentioned above. On July 8, 2013, the
18 bankruptcy court denied Debtors' request for entry of order by
19 default on procedural grounds: (1) the notice was defective
20 because it did not identify the real property which was the
21 subject of the motion and (2) the motion was not served on
22 counsel listed on the abstract of judgment as required under CCP
23 § 684.010.

24 Debtors moved for reconsideration of the order under Civil
25 Rule 59(a) and/or 60(b)(2), made applicable to bankruptcy
26 proceedings by Rules 9023 and 9024. Debtors argued that notice
27 was proper under federal law because the property address was
28 given in the motion and the supporting declarations. While

1 Debtors acknowledged that the notice did not specify the
2 property address, they maintained that the notice made clear
3 that Wells Fargo's failure to act could result in the loss of
4 lien rights. In addition, the accompanying motion contained the
5 property address. Debtors further asserted that the notice and
6 motion complied with (1) the bankruptcy court's local rule (BLR)
7 9013-1(b)(1) and (2); (2) § 102 and Rules 9014 and 7004; and (3)
8 the practices and procedures in Judge Efremsky's court.
9 Finally, citing Beneficial Cal. Inc. v. Villar (In re Villar),
10 317 B.R. 88 (9th Cir. BAP 2004), Debtors maintained that service
11 on the attorney that obtained the underlying judgment under CCP
12 § 684.010 was not required. On July 22, 2013, the bankruptcy
13 court denied Debtors' motion for reconsideration without a
14 hearing. Debtors timely filed a notice of appeal.

15 **II. JURISDICTION**

16 The bankruptcy court had jurisdiction over this proceeding
17 under 28 U.S.C. §§ 1334 and 157(b)(2)(K). We have jurisdiction
18 under 28 U.S.C. § 158.

19 **III. ISSUES**

20 A. Whether the bankruptcy court erred by requiring
21 Debtors to comply with the service requirements under CCP
22 § 684.010; and

23 B. Whether the bankruptcy court erred in finding that
24 Debtors' notice of motion to avoid Wells Fargo's judicial lien
25 was defective because it failed to identify the property.

26 **IV. STANDARD OF REVIEW**

27 We review the bankruptcy court's application of procedural
28 rules and whether a particular procedure comports with due

1 process de novo. All Points Cap. Corp. v. Meyer (In re Meyer),
2 373 B.R. 84, 87 (9th Cir. BAP 2007); In re Villar, 317 B.R. at
3 92; see also Berry v. U.S. Trustee (In re Sustaita), 438 B.R.
4 198, 207 (9th Cir. BAP 2010) (whether adequate due process
5 notice was given in any particular instance is a mixed question
6 of law and fact reviewed de novo) (citing Demos v. Brown (In re
7 Graves), 279 B.R. 266, 270 (9th Cir. BAP 2002)).

8 V. DISCUSSION

9 Section 522(f) is a powerful right available to a debtor.
10 It allows a debtor to avoid a creditor's judgment lien on his or
11 her real property if the debtor's interest in that property
12 would be exempt but for the existence of the creditor's lien.
13 Because a debtor may avoid the judicial lien creditor's interest
14 in the property without its consent, strict compliance with
15 procedural matters when presenting a motion to avoid the
16 creditor's lien is required. See In re Villar, 317 B.R. at 92-
17 95. "The litigant attempting to effect service is responsible
18 for proper service and bears the burden of proof." Id. at 94.

19 Rules 4003(d), 9014 and 7004 govern the notice and service
20 requirements for lien avoidance motions under § 522(f). These
21 rules provide a coherent scheme of procedural due process
22 safeguards. Rule 4003(d) states that a proceeding by the debtor
23 to avoid a lien under § 522(f) shall be by motion in accordance
24 with Rule 9014. Rule 9014 governs contested matters. Rule
25 9014(a), in turn, provides that relief shall be requested by
26 motion and "reasonable notice and opportunity for hearing shall
27 be afforded the party against whom relief is sought." Through
28 Rule 9001, § 102(1) governs the construction of the phrase

1 "reasonable notice and opportunity for hearing." The amount of
2 notice and the opportunity for hearing are normally those which
3 are "appropriate in the particular circumstances." § 102(1)(A).
4 "The standard for what amounts to constitutionally adequate
5 notice, however, is fairly low; it's 'notice reasonably
6 calculated, under all the circumstances, to apprise interested
7 parties of the pendency of the action and afford them an
8 opportunity to present their objection.'" Espinosa v. United
9 Student Aid Funds, Inc., 553 F.3d 1193, 1202 (9th Cir. 2008)
10 (citing Mullane, 339 U.S. at 314), aff'd, 559 U.S. 260 (2010).

11 However, when a particular creditor's rights are at issue
12 such as in lien avoidance proceedings, the bankruptcy rules
13 require a more rigorous type of notice. In that circumstance, a
14 party is entitled to service. Rule 9014(b) states that service
15 of the motion is required to be in a manner provided in Rule
16 7004. Rule 7004(h) governs service of process on an insured
17 depository institution such as Wells Fargo. This rule provides
18 that service on such an institution shall be made by certified
19 mail addressed to an officer of the institution unless--

20 (1) the institution has appeared by its attorney, in
21 which case the attorney shall be served by first class
mail;

22 (2) the court orders otherwise after service upon the
23 institution by certified mail of notice of an
24 application to permit service on the institution by
first class mail sent to an officer of the institution
designated by the institution; or

25 (3) the institution has waived in writing its
26 entitlement to service by certified mail by
designating an officer to receive service.

27 Plainly, Rule 7004(h) is the standard against which we measure
28 the adequacy of the service given the facts before us. See In

1 re Meyer, 373 B.R. at 98-100 (concurrency and dissent by J.
2 Montali) (citing Hanna v. Plumer, 380 U.S. 460, 463-64 (1965)).

3 **A. Debtors Complied with Rule 7004(h)**

4 The Certificate of Service shows that Debtors served their
5 lien avoidance motion, the accompanying declarations, and the
6 notice for opportunity of hearing in accordance with Rule
7 7004(h); i.e., the motion and accompanying pleadings were served
8 by certified mail and addressed to the attention of an officer
9 of Wells Fargo. None of the exceptions to compliance with Rule
10 7004(h) are relevant to this case. Notably, at no time did an
11 attorney appear for Wells Fargo in the bankruptcy case to
12 trigger the application of Rule 7004(h)(1). While attorneys can
13 be authorized to accept service of process for a judicial lien
14 creditor implicitly as well as explicitly, the fact that
15 attorney Reese evidently represented Wells Fargo in the state
16 court action that gave rise to the judicial lien is not enough
17 by itself to establish implicit authority for Reese to accept
18 service of process in matters involving Debtors' bankruptcy.
19 See In re Villar, 373 B.R. at 93; see also Rubin v. Pringle (In
20 re Focus Media, Inc.), 387 F.3d 1077, 1083 (9th Cir. 2004)
21 (holding that a former attorney must have explicit or implicit
22 authority from the client to accept service under Rule 7004(b)).
23 Accordingly, Debtors' compliance with Rule 7004(h) satisfies the
24 first half of the requirement under Mullane – that interested
25 parties be apprised of the pendency of the action.⁴

26
27 ⁴ If Debtors had simply mailed the notice and motion to a
28 non-officer by regular mail to an address listed in the POC, this
method would not comport with Rule 7004(h).

1 **B. Compliance With The Service Requirements of CCP § 684.010**
2 **Is Not Required For Lien Avoidance Motions**

3 CCP § 684.010 provides in relevant part:

4 [W]hen a notice, order, or other paper is required to
5 be served under this title [Title 9 Enforcement of
6 Judgments] on the judgment creditor, it shall be
7 served on the judgment creditor's attorney of record
8 rather than on the judgment creditor if the judgment
9 creditor has an attorney of record.

10 Although Debtors rely on Villar for the proposition that
11 service on attorney Reese is not required under these
12 circumstances, the Panel in Villar did not specifically address
13 the applicability of CCP § 684.010 to lien avoidance motions.
14 Several years after Villar, Judge Klein addressed the question
15 in dicta in a separate concurring opinion in In re Meyer, 373
16 B.R. at 92. Although the underlying facts and legal issues
17 presented in Meyer are different from those here, we provide a
18 brief background for context.

19 In Meyer, the chapter 7 debtor sought to avoid two judgment
20 liens against property which was co-owned. The debtor served
21 the senior judgment lienholder, American Capital Resources, Inc.
22 (American Capital), in accordance with Rule 7004(b)(3) and
23 served the junior lienholder, All Points Capital Corporation
24 (All Points), through its attorney of record. American Capital
25 did not respond to the motion; however, All Points did. At the
26 hearing, All Points argued that American Capital's lien should
27 be first avoided by default and excluded from the analysis.
28 Under this theory, All Point's lien would partially survive
avoidance. The bankruptcy court granted the debtor's lien
avoidance motion in its entirety without making findings of fact

1 and conclusions of law articulating its reasoning about the
2 statutory formula for lien avoidance. All Points' lien was
3 avoided in its entirety. All Points appealed.

4 The Panel held that consensual liens against the entire fee
5 must be netted out before computing the value of a debtor's
6 fractional interest for purposes of avoiding judgment liens on
7 which the co-owner is not liable. The Panel also held that All
8 Point's theory for exploiting default to squeeze out the senior
9 lien offended the rule that multiple liens impairing exemptions
10 be avoided in order of reverse priority and also offended the
11 rule that a default judgment should not be entered when it is
12 not warranted on the merits. The Panel vacated the bankruptcy
13 court's decision and remanded.

14 Although not discussed in the majority opinion, in a
15 separate concurrence, Judge Klein observed a "due process notice
16 issue embedded in the facts" because American Capital did not
17 respond to the debtor's motion. 373 B.R. at 92. Judge Klein
18 acknowledged that the debtor had properly served American
19 Capital by mail in accordance with Rule 7004(b)(3) and the
20 holding in Villar, but noted that CCP § 684.010 conflicted with
21 Villar because the statute required judgment enforcement matters
22 to be directed to the counsel who obtained the judgment and not
23 to the judgment creditor. Id. at 93. Thus, Judge Klein
24 concluded that because of this "asymmetry" between Rule 7004 and
25 Villar on the one hand, and CCP § 684.010 on the other, "a
26 California judgment creditor who receives a notice that must be
27 sent to counsel may reasonably think that the notice can be
28 ignored as either redundant of service on counsel or

1 ineffective." Id. Implicitly, Judge Klein surmised that this
2 may have been the reason why American Capital did not appear in
3 the lien avoidance action.

4 Accordingly, Judge Klein found the time was ripe to
5 "clarify" the rule in Villar. In so doing, he noted the United
6 States Supreme Court's decision in Jones v. Flowers, 547 U.S.
7 220 (2006), which emphasized the need for "'reasonable
8 additional steps' when a property right would be extinguished
9 and there is reason to doubt the efficacy of notice." 373 B.R.
10 at 94. Judge Klein reasoned that although service may comply
11 with Rule 7004, to comport with due process, "the better
12 practice for bankruptcy judicial lien avoidance motions in any
13 state is to serve both the judgment creditor and the attorney of
14 record." Id. On remand, Judge Klein urged the bankruptcy court
15 to assure itself that notice was provided to American Capital
16 consistent with due process. Id.

17 In a separate concurrence and dissent, Judge Montali
18 disagreed that CCP § 684.010 was applicable to lien avoidance
19 motions given the holding in Hanna. In Hanna, the United States
20 Supreme Court upheld the adoption of Civil Rule 4(d)(1) to
21 control service of process in diversity cases notwithstanding a
22 state law that required a different method. It noted that to
23 hold that a federal service rule ceases to function when it
24 alters the mode of enforcing state created rights would be to
25 ". . . disembowel either the Constitution's grant of power over
26 federal procedure or Congress' attempt to exercise that power in
27 the Enabling Act." In re Meyer, 373 B.R. at 98 n.8 (citing
28 Hanna, 380 U.S. at 473-74). Judge Montali noted: "While the

1 concurrence does not purport to replace Rule 7004 with [CCP]
2 § 684.010, its reliance on California law certainly is
3 inconsistent with Hanna and should be disregarded." Id.

4 Judge Montali also found that CCP § 684.010 was
5 inapplicable to lien avoidance motions for other reasons.
6 First, there was nothing in Title 9, which contained CCP
7 § 684.010 and addressed the Enforcement of judgments, or in
8 California law generally, which permitted a judgment debtor to
9 eliminate all or a portion of a judgment lien to the extent it
10 impaired the judgment debtor's exemption. Id. at 99. Second,
11 the "procedural rule imposed by the California legislature
12 appears to be more a matter of convenience than of fundamental
13 due process." Id. Therefore, the judge concluded there is no
14 "hint that California law must be complied with when a party
15 avails itself of a right found exclusively within the Bankruptcy
16 Code." Id. Finally, the judge opined that applying CCP
17 § 684.010 to lien avoidance actions amounts to a "'slippery
18 slope' which can only confuse the issue further about where and
19 when bankruptcy practitioners should follow state law even when
20 they comply with applicable bankruptcy rules." Id.

21 In the end, Judge Montali recognized that Judge Klein's
22 concurrence in relation to CCP § 684.010 was an "advisory
23 opinion" as no party raised the issue and "by no means [was]
24 this view the holding of this decision." Id. On this point,
25 it is apparent that a majority of the Panel did not focus on why
26 American Capital had not appeared to defend the debtor's motion
27 nor did the majority consider a due process argument not raised
28 by the parties in the appeal. See Espinosa, 553 F.3d at 1199-

1 1200 n.3 ("Anything [a prior case] has to say as to matters not
2 presented in that case is, in any event, dicta and thus not
3 binding on us."). Although dicta, the discussion in Meyers on
4 the application of CCP § 684.010 to lien avoidance actions is
5 helpful to us in resolving the issue which is directly before
6 us.

7 Initially, we note that even if service was made on
8 attorney Reese in compliance with CCP § 684.010, that would be
9 inadequate under the holding in Villar. "We cannot presume from
10 [Reese's] handling the litigation that resulted in the judicial
11 lien that he is also authorized to accept service for a motion
12 to avoid the judicial lien." 317 B.R. at 93. Here, the record
13 shows that no attorney from the Reese Law Group ever appeared in
14 Debtors' bankruptcy case purporting to represent Wells Fargo and
15 there is no other evidence to show that Reese was authorized to
16 accept service of process.⁵

17 In addition, Rule 1001 provides: "The Bankruptcy Rules and
18 Forms govern procedure in cases under title 11 of the United
19 States Code." Rule 7004 governs the procedure for service of
20 lien avoidance motions as stated by Rule 9014(b). Nowhere do
21 the bankruptcy rules require compliance with CCP § 684.010 nor
22 do we perceive any reason why compliance should be compelled in
23 light of the procedural due process safeguards provided by the
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25
26 ⁵ Indeed, Debtors had served attorney Reese of the Reese
27 Law Group with their first motion to avoid Wells Fargo's judicial
28 lien and their request for entry of order by default at his
address listed on the California Bar website. However, neither
Reese nor any other attorney from his office responded or
appeared on behalf of Wells Fargo to oppose the first motion.

1 rules themselves.

2 We therefore conclude that the view espoused by Judge
3 Montali in Meyer is the better one in light of Hanna and the
4 judge's sound reasoning. Applying CCP § 684.010 to lien
5 avoidance actions indeed fosters confusion about where and when
6 bankruptcy practitioners should follow state law even when they
7 comply with applicable bankruptcy rules. In re Meyers, 373 B.R.
8 at 98-99. Accordingly, Debtors' failure to serve the judgment
9 creditor's attorney listed on the abstract of judgment with the
10 notice and motion to avoid the judgment creditor's lien was not
11 an appropriate basis for the bankruptcy court to deny their
12 request for entry of an order by default.

13 **C. Wells Fargo Had Sufficient Notice That Its Lien Was At**
14 **Issue**

15 The second part of the Mullane test requires that the
16 notice provided must afford the affected party an opportunity to
17 present their objections. Mullane, 339 U.S. at 314. While
18 Mullane revolved principally around the constitutional adequacy
19 of service by publication, the court stated that "[t]he notice
20 must be of such nature as reasonably to convey the required
21 information." Id.

22 Here, the notice stated that Debtors had filed a motion to
23 avoid the judicial lien in favor of Wells Fargo and they gave
24 the date the lien was recorded, the County that it was recorded
25 in, and the document number. This information was sufficient to
26 allow Wells Fargo to identify the property subject to its lien.
27 If Wells Fargo had any doubt, Debtors' motion sufficiently
28 notified it that its judgment lien recorded against Debtors'

1 residential property was at issue, in compliance with Rule 9013.
2 Under this rule, the lien should be reasonably identified and
3 the relief requested and the basis for the relief requested
4 shall be stated with "particularity." See Rule 9013; BLR
5 9013(b). Debtors' motion identified Wells Fargo as the creditor
6 holding a judgment lien, identified the lien in jeopardy by
7 stating the date on which it was recorded and provided the
8 document recordation number, and set forth the physical address
9 of the property which was impacted by the lien. Finally, the
10 motion specifically asked the bankruptcy court to avoid Wells
11 Fargo's judicial lien under § 522(f).

12 We conclude that both the motion and notice afforded Wells
13 Fargo the opportunity to present its objections because the
14 notice and motion reasonably conveyed the required information.
15 Therefore, although the notice did not specifically set forth
16 the address of the property, this deficiency was not an
17 appropriate basis for the bankruptcy court to deny Debtors'
18 request for entry of an order by default.

19 VI. CONCLUSION

20 Wells Fargo, properly served, did not oppose Debtors'
21 motion to avoid its judicial lien and, therefore, its lien was
22 effectively avoided by default. Accordingly, the bankruptcy
23 court erred in denying Debtors' request to avoid Wells Fargo's
24 judicial lien by default on the procedural grounds stated. We
25 REVERSE and REMAND.⁶

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28 ⁶ By our conclusion, we do not opine whether entry of
default is warranted on the merits or for any other reason.