

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re:)
)
) Case No. 06-23729-B-7
CARLOS CRESPO,)
) Docket Control No. WAJ-1
)
Debtor.) Date: November 7, 2006
)
) Time: 9:30 a.m.

On or after the calendar set forth above, the court issued the following ruling. The official record of the ruling is appended to the minutes of the hearing.

Because the ruling constitutes a "reasoned explanation" of the court's decision under the E-Government Act of 2002 (the "Act"), a copy of the ruling is hereby posted on the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format, as required by the Act. However, this posting does not constitute the official record, which is always the ruling appended to the minutes of the hearing.

DISPOSITION AFTER ORAL ARGUMENT

This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 9014-1(f)(1). However, because the debtor is pro se, the court will issue a tentative ruling.

The motion is granted in part and denied in part. The movant's motion for relief from the automatic stay is granted to the extent set

1 forth herein. As against the estate and the debtor, the automatic
2 stay is modified pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2) in
3 order to permit the movant to proceed with the state court unlawful
4 detainer action. The movant served the debtor with a three day notice
5 to quit on August 28, 2006. The debtor did not cure the lease default
6 stated in the three day notice, and movant filed an unlawful detainer
7 action in Sacramento County Superior Court on September 11, 2006. The
8 state court action was halted by the filing of the debtor's bankruptcy
9 petition on September 20, 2006.

10 Service of the three day notice and expiration of the time to
11 cure terminated the lease. Cal. Civ. Code § 1951.2; 7 Miller & Starr,
12 California Real Estate § 19:201 (3d Ed. 2004). Neither the estate nor
13 the debtor has any remaining leasehold interest. Neither the estate
14 nor the debtor has any equity in the property, and it is not necessary
15 for an effective reorganization. The movant alleges without dispute
16 that the debtor has defaulted in lease payments. The pre-petition
17 termination of the lease and the absence of opposition by the trustee
18 shows that the trustee cannot administer the property for the benefit
19 of creditors. The foregoing constitutes cause for relief from the
20 automatic stay.

21 By his own admission, movant obtained an unlawful detainer
22 judgment by default two days after the debtor filed his petition. The
23 continuation of the unlawful detainer action after the petition was
24 filed was a violation of the automatic stay under 11 U.S.C. §
25 362(a)(1). Such violations of the automatic stay are void. See In re
26 Schwartz, 954 F.2d 569, 571 (9th Cir. 1992). However, movant alleges
27 without dispute that he had no notice or knowledge of the bankruptcy
28

1 filing when the default judgment was obtained. Movant further alleges
2 without dispute that the debtor has failed to pay at least four months
3 of pre-petition rent and at least one month of post-petition rent.
4 The debtor filed (erroneously) a certification under 11 U.S.C. §
5 362(1), but the debtor deposited no rent with the clerk as required by
6 11 U.S.C. § 362(1)(1)(B). These facts constitute cause for
7 retroactive relief from the automatic stay. Accordingly, the
8 modification of the automatic stay set forth above is made
9 retroactively and is effective as of the date and time of the filing
10 of the petition that commenced this case.

11 The movant's objection to the debtors certification filed under
12 11 U.S.C. § 362(1)(1) is overruled as unripe. The provisions of
13 Section 362(1) are not applicable here, as the movant was never
14 entitled to exemption from the automatic stay pursuant to Section
15 362(b)(22). Pursuant to Section 362(b)(22), the automatic stay does
16 not apply when the lessor has obtained before the date of the filing
17 of the petition a judgment against the debtor for possession of leased
18 residential property. Here, by the movant's own admission, the movant
19 did not obtain his default judgment until two days after the petition
20 was filed. Thus, by its plain language, Section 362(b)(22) is not
21 applicable.

22 Because the movant has not established that it is the holder of
23 an allowed secured claim, the court awards no fees and costs. 11
24 U.S.C. § 506(b).

25 The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived.

26 Except as so ordered, the motion is denied.

27
28