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UNITED STATES BANKRUPTCY COURT EASTERN
DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re) Case No. 18-27039-E-13
NADIA KOSTYUK,)
)
Debtor.)

**This Memorandum Decision is not appropriate for publication.
It may be cited for persuasive value on the matters addressed.**

**MEMORANDUM OPINION AND DECISION
FOR FINAL ORDER IMPOSING AUTOMATIC STAY PURSUANT
TO 11 U.S.C. § 362(c)(4)(B) FOR ALL PARTIES,
EXCLUDING BBV PROFIT SHARING PLAN**

In this third Chapter 13 Case filed by Debtor Nadia Kostyuk (“Third Bankruptcy Case”), the Debtor and her non-debtor husband, have sought relief from the court in the form of a Motion titled “Motion to Set Aside Trustee Sale; Motion by Debtor For an Order Obtaining and Imposing the Automatic stay Pursuant to 11 U.S.C. § 362(c)(4)(B).” Motion, Dckt. 11. The court addresses the Motion and relief requested below.

Correction of Court’s Clerical Error

As an initial matter, the court’s clerical error on December 6, 2018, may have caused a brief bit of confusion (and possible consternation) for the parties. Fortunately, the court’s clerical error was quickly caught and rectified. The clerical error was the use of the wrong draft ruling form of decision and order which were then erroneously signed and filed on the docket on December 6, 2018. The court corrected the court’s error in signing the wrong decision and order form. The Decision

1 below is consistent with the decision as stated at the hearing on December 4, 2018.¹

2 **REVIEW OF MOTION AND PRIOR HEARINGS**

3 On November 8, 2018, Nadia Kostyuk, the Chapter 13 Debtor (“Debtor”), commenced this
4 bankruptcy case. Ms. Kostyuk has filed two recent prior bankruptcy cases, which are:

5

6 Chapter 13 Case 18-26000 7 (“Second Bankruptcy Case”) Represented by Counsel	Filed: September 23, 2018 Dismissed: October 12, 2018
8 Chapter 13 Case 18-25398 9 In <i>Pro Se</i>	Filed: August 28, 2018 Dismissed: September 17, 2018

10

11 In case 18-26000 Debtor was represented by the same counsel as in the present bankruptcy case.

12 BBV Profit Sharing Plan, a 401K Deferred Compensation Retirement Plan (“BBV) has
13 imposed the imposition of the automatic stay. BBV asserts that it is the creditor who had a
14 nonjudicial foreclosure sale conducted for the real property commonly known as 6500 Auburn
15 Folsom Road, Granite Bay, California (the “Property”), and that BBV was the successful purchaser
16 of the Property at said nonjudicial foreclosure sale.

17 **Motion to Shorten Time**

18 On November 14, 2018, the Debtor filed a Motion to Shorten Time for hearing on Debtor’s
19 Motion for the substantive relief discussed below. Dckt. 10. Debtor requests the court conduct a
20 hearing on November 20, 2018, because Debtor is seeking to have the court impose the automatic
21 stay in this case pursuant to 11 U.S.C. §362(c)(4)(B). There are stated to be a number of
22 “threatened” state court actions relating to a non-judicial foreclosure sale which occurred on
23 November 9, 2018, one day after the current bankruptcy case was filed.

24 The court issued an Order granting the Motion To Shorten Time on November 15, 2018.

25

26 ¹ To be clear, the court (judge) follows his own “advice” to counsel and parties - human
27 beings make mistakes, acknowledge them, act to correct them, and don’t blame others. The court
28 - the judge - owns up to and acknowledges his own clerical error in using the wrong drafts in
generating the decision and order documents.

1 Order, Dckt. 16.

2 **Motion to Set Aside Trustee Sale &**
3 **Motion to Impose Automatic Stay**

4 On November 14, 2018, Debtor filed a multifaceted pleading titled “Notice of Motion and
5 Motion to Set Aside Trustee Sale; Motion by Debtor for an Order Obtaining and Imposing the
6 Automatic Stay Pursuant to 11 U.S.C. § 362(c)(4)(B), Memorandum of Points and Authorities,
7 Declaration of Julia M. Young, Declaration of Nadia Kostyuk, and Declaration of Alex Kostyuk.”
8 Dckt. 11.

9 The Motion requests the court impose and extend the automatic stay in this case, as well as
10 set aside a trustee sale that took place on November 9, 2018.

11 **November 20, 2018 Hearing**

12 At the hearing, Debtor’s husband and Debtor’s counsel stated their pleas that the foreclosure
13 sale should be set aside. Initially, Debtor’s counsel stated that if the court imposed the stay it would
14 relate back to the commencement of the case and render the sale void. The court reviewed the
15 provision of 11 U.S.C. § 362(c)(4)(C), which was included in the court’s tentative ruling posted for
16 review the day before the hearing, and that the stay imposed under § 362(c)(4)(B) is effective from
17 the day imposed, not the commencement of the case.

18 The court discussed the use of the automatic stay in lieu of a state court or federal court
19 injunction, and the requirement for the Debtor to fund an adequate protection/claim payment fund
20 that would serve in the place of an injunction bond. Additionally, the court reviewed the Debtor’s
21 need to prosecute (whether in the state court, district court, or adversary proceeding in this court)
22 whatever claims it believes provide for avoiding the foreclosure sale. (Debtor’s counsel, without
23 citation to any legal authority, suggested that this court, on motion, could avoid the sale since it was
24 "unfair" in light of the purported equity in the property.)

25 As discussed by the court at the hearing, imposition of an interim stay that will delay Creditor
26 for several weeks in acting on its trustee’s deed will be of little negative impact on Creditor.
27 However, it may well be the difference between Debtor acting to enforce any rights Debtor may have
28 and Debtor continuing in what appears to be a downward spiral of loss.

1 The court addressed with Debtor's counsel the need to present how the Debtor will be
2 prosecuting this case, including a Chapter 13 Plan, consistent with the Bankruptcy Code if the court
3 will further extend the stay. A bankruptcy case does not exist, and is not being properly prosecuted
4 if it exists merely to obtain a stay (which may not actually apply to Creditor) and not otherwise
5 diligently prosecute the case.

6 **November 26, 2018 Order &**
7 **Amended Order**

8 After the November 20, 2018, hearing the court issued an Order granting the Motion on an
9 interim basis, and imposed the stay effective through 11:59 p.m. on December 14, 2108 unless
10 terminated by operation of law or further order of this court, or further extended by the court. Order,
11 Dckt. 33. The court denied without prejudice the Debtor's request to set aside the trustee's sale.
12 Order, Dckt. 33, 34. The court further continued the hearing on the Motion to December 4, 2018, and
13 Ordered Debtor to file supplemental pleadings on or before December 30, 2018. *Id.*

14 The court issued an Amended Order on November 28, 2018, revising the Order to require
15 supplemental pleadings be filed on or before November 29, 2018. Order, Dckt. 34

16 **Applicable Law**

17 When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4), a party in interest may
18 request within 30 days of filing that the stay take effect as to any or all creditors (subject to such
19 conditions or limitations as the court may impose), after notice and a hearing, only if the
20 party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be
21 stayed. 11 U.S.C. § 362(c)(4)(B).

22 For purposes of subparagraph (B), a case is presumptively filed not in good faith as to all
23 creditors if:

24 (I) 2 or more previous cases under this title in which the individual was a
25 debtor were pending within the 1-year period;

26 (II) a previous case under this title in which the individual was a debtor was
27 dismissed within the time period stated in this paragraph after the debtor failed to file
28 or amend the petition or other documents as required by this title or the court without
substantial excuse (but mere inadvertence or negligence shall not be substantial
excuse unless the dismissal was caused by the negligence of the debtor's attorney),
failed to provide adequate protection as ordered by the court, or failed to perform the

1 terms of a plan confirmed by the court; or

2 (III) there has not been a substantial change in the financial or personal affairs
3 of the debtor since the dismissal of the next most previous case under this title, or any
4 other reason to conclude that the later case will not be concluded, if a case under
chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed
plan that will be fully performed; . . .

5 11 U.S.C. § 362(c)(4)(D).

6 In determining if good faith exists, the court considers the totality of the circumstances. *In*
7 *re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the*
8 *Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*,
9 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect
10 of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-
11 01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*,
12 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those
13 used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine
14 good faith under § 362(c)(3) are:

15 A. Why was the previous plan filed?

16 B. What has changed so that the present plan is likely to succeed?

17 *In re Elliot-Cook*, 357 B.R. at 814–15.

18 **Review of Supplemental Pleadings and Plan**

19 Supplemental Pleadings were filed by the Debtor on November 29, 2018. These
20 Supplemental Pleadings are considered by the court in evaluating the extent to which Debtor has
21 been able to rebut the presumption of bad faith in the filing of this third bankruptcy case in the past
22 year. 11 U.S.C. § 362(C)(4)(b).

23 Debtor’s Chapter 13 Plan has been filed, which terms are summarized as follows:

24 A. The Plan payments are one lump sum payment of \$10,000.00 in month one of the
25 Plan and then payments of \$2,000.00 a month for each of the remaining fifty-nine
months of the Plan.

26 B. For Class 1 Claims, no monthly payments will be made on the claim of Capital
27 Mortgage and a \$1,759.00 a month post-petition payment will be made on the
Mortgage Lender Services’ secured claim (for which there is no stated Class 1
28 arrearage to be cured).

- 1 C. There are no Class 2, 3, or 4 secured claims provided for in the Plan.
- 2 D. There are no Class 5, 6, or 7 priority, special treatment, or general unsecured claims
3 to be paid for through the Plan.
- 4 E. There are no other provisions for payment of claims, providing adequate protection
5 payments, or prosecuting claims and rights of the estate (including the alleged right
6 to set aside a foreclosure sale).

6 Chapter 13 Plan, Dckt. 46.

7 An Amended Petition, Amended Schedules, and Amended Statement of Financial Affairs
8 have been filed several times. Dckts. 47, 48. Included in the refilings is a “Chapter 13 Plan -
9 Amended.” Dckt. 48 at 1-8. The terms of the “Amended Plan” are the same as the above reviewed
10 plan.

11 On November 29, 2018, the Debtor filed a pleading titled “Supplemental Motion to Continue
12 the Automatic Stay.” Dckt. 49. This appears to be a supplement to the existing motion now before
13 the court to impose the stay - which has been imposed on an interim basis. The grounds advanced
14 by Debtor in this Supplemental Pleading are:

- 15 A. Debtor’s only creditor is BBV Profit Sharing Plan (“BBV”), the obligation of Debtor
16 and her husband owing to BBV secured by the junior deed of trust on Debtor’s
17 residence.
- 18 B. Debtor is current on the payments due on the claim secured by the senior deed of
19 trust on Debtor’s residence.
- 20 C. Debtor has sufficient income to pay the obligation owed to BBV secured by the
21 junior deed of trust through a Chapter 13 Plan.
- 22 D. The Amended Chapter 13 Plan provides for paying BBV \$10,000.00 in the first
23 month of the plan and then \$2,000.00 a month for the remaining fifty-nine months
24 of the Plan.

22 As noted in the summary above, no provision is made for paying BBV \$10,000.00 in the first month
23 and then \$2,000.00 a month for fifty-nine months. The only provision is for paying Mortgage Lender
24 Services \$1,759.00 a month.

- 25 E. The Debtor is identified as working as a caregiver and is also the president of her
26 own real estate company, Nako Investments.
- 27 F. The Supplemental Pleading then misstates the provisions of 11 U.S.C.
28 § 362(c)(4)(A), asserting that it “limits the automatic stay to thirty days after the
filing of the later case when the Debtor has filed two or more single or joint cases that
have been dismissed without prejudice within the past year.”

1 As discussed at the prior hearing, the provisions of 11 U.S.C. § 362(c)(4)(A) state:

2 (4) (A) (I) if a single or joint case is filed by or against a debtor who is an individual
3 under this title, and if 2 or more single or joint cases of the debtor were pending
4 within the previous year but were dismissed, other than a case refiled under a chapter
other than chapter 7 after dismissal under section 707(b), **the stay under subsection
(a) shall not go into effect upon the filing of the later case;**

5 11 U.S.C. § 362(c)(4)(A) [emphasis added]. Contrary to what is stated in the Supplemental
6 Pleadings, 11 U.S.C. § 362(c)(4)(A) provides that there in no automatic stay that goes into effect
7 upon the filing of a bankruptcy case when two prior cases were pending and dismissed in the one
8 year period preceding the filing of the then current case.

9 G. Debtor needs bankruptcy relief to pay the obligation to BBV because it came due in
10 full in December 2017, and Debtor and her husband have been unsuccessful in
negotiating with BBV to agree to extend the payment terms.

11 On the latest Amended Schedule I filed by Debtor (Dckt. 41 at 1-2) Debtor states that her
12 income and her husband's income consists of the following:

13 A. Debtor's Gross Wage Income.....\$2,451.00
14 B. Debtor's Net Income From Her Business.....\$7,653.13
15 C. Debtor's Husband's Wage Income.....\$2,545.00

16 No provision made for any federal, state, or self-employment taxes is shown on Amended
17 Schedule I.

18 On the Statement of Financial Affairs Debtor states that she has been operating her business,
19 Nako Investment Corp., since June 2014. Statement of Financial Affairs Question 27, Dckt. 41 at 6.
20 It is not clear if Debtors "business income" is in the form of wages, commissions, dividends, or
21 profit distributions (if a Sub-Chapter S corporation).

22 While stating that Debtor has the business Nako Investment Corp. which is generating more
23 that \$85,000.00 a year in income for Debtor, she does not list the stock of Nako Investment Corp.
24 as an asset on Schedule A/B. Schedule A/B Question 19, Dckt. 37 at 4.

25 On Amended Schedule J, *Id.* at 35-36, Debtor lists the reasonable and necessary expenses
26 for a family unit of four persons: Debtor, Debtor's spouse, teenage son, and Debtor's mother (for
27 whom no income or contribution is shown on Amended Schedule I). No provision is made on
28 Schedule J for the payment of federal or state income or self-employment taxes. On Amended

1 Schedule J Debtor states that the family unit of four has no medical or dental expenses, and
2 transportation expenses of \$50.00 a month.

3 The court notes that in her prior bankruptcy case, Debtor stated under penalty of perjury that
4 her monthly net business income was \$3,000.00. 18-26000; Schedule I, Dckt. 1 at 28. That
5 Schedule I was filed on September 24, 2018, two months before the Amended Schedule I in this case
6 was filed.

7
8 **December 4, 2018 Hearing
and Post-Hearing Review**

9 At the hearing on December 4, 2018 At the December 4, 2018 hearing on the Motion,
10 Debtor's counsel offered little more than a discussion that Debtor's husband was interviewing
11 attorneys, that they could proceed with litigation, and that all Debtor thought she would have to do
12 is show the court that she was "prosecuting a plan." A proposed amended plan was filed on
13 November 29, 2018, which treats BBV as a creditor in Class 1, makes no provision for paying the
14 obligation secured by the senior deed of trust on the property that secured/secures the BBV
15 obligation, and does not incorporate any active litigation to set aside the foreclosure sale.

16 Based on what was presented, the court concluded that the automatic stay would stay
17 imposed for all creditors, except BBV.

18 After the hearing, the court further considered the proposition that the stay was terminated
19 as of the dismissal of the case or was predicated on some other event. As set forth in 11 U.S.C.
20 § 362(c)(1), which states (emphasis added):

21 (c) Except as provided in subsections (d), (e), (f), and (h) of this section—

22 (1) the stay of an act **against property of the estate** under subsection (a) of
23 this section **continues until such property is no longer property of the estate;**

24 (2) the stay of any other act under subsection (a) of this section continues
until the earliest of—

25 (A) the time the case is closed;

26 (B) the time the case is dismissed; or [provision tied to entry of discharge in
27 Chapter7 case]

28 In considering the issue and cognizant of the direction from the U.S. Supreme Court in

1 *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) putting responsibility for the trial
2 court to “get the law right,” the court conducted some additional legal research and drafting of an
3 alternative ruling taking into account the provisions of 11 U.S.C. § 554 concerning abandonment of
4 property of the bankruptcy estate. This took the form of drafting an alternative version of the
5 decision. Though not intended to be issued, the court (judge) generated the incorrect ruling form
6 which applied 11 U.S.C. § 554 to the prior dismissal of the bankruptcy case.

7 When a dismissal occurs, the provisions of 11 U.S.C. § 349 govern the property of the
8 bankruptcy estate. When a bankruptcy case is dismissed:

9 (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than
10 under section 742 of this title—

11 (3) . . .
12 (3) reverts the property of the estate in the entity in which such property was vested
13 immediately before the commencement of the case under this title.

14 BBV has argued that the post-petition foreclosure sale on November 9, 2018, was not in
15 violation of the automatic stay, the Second Bankruptcy Case having been dismissed, and there being
16 no automatic stay imposed in this case as of the November 9, 2018 foreclosure.²

17 Counsel for Debtor addressed the court at the hearing, advising the court that Debtor would
18 be commencing the appropriate state court, district court, or adversary proceeding to assert Debtor’s
19 contention that the nonjudicial sale could be set aside or was not effective.

20 The court notes that on December 16, 2018, the Debtor and Debtor’s counsel commenced
21 Adversary Proceeding 18-2195 by filing a complaint in this court asserting various claims, including
22 injunctive relief, quiet title, and wrongful foreclosure. 18-2195, Dckt. 1.

23 **Decision Imposing Stay For All Persons**
24 **and Purposes – Except for BBV Profit Sharing Plan**

25 As stated at the hearing, the court imposes the automatic stay for all persons and purposes,
26 except for BBV Profit Sharing Plan, the foreclosing creditor and purchase of the Property at issue
27 at the November 9, 2018 nonjudicial foreclosure sale. Debtor may proceed with her Chapter 13 Plan

28 ² The court makes no ruling on the issues concerning the termination of the automatic
stay, to the extent that any person believes contrary to the application of 11 U.S.C. § 349 when a
case is dismissed as opposed to the application of 11 U.S.C. § 554.

1 and the litigation concerning the Property.

2 The court shall issue a separate order imposing the automatic stay in this case (making the
3 prior interim order part of this final order) as set forth above - excluding BBV Profit Sharing Plan
4 from the scope of said imposed stay.

5 This Decision constitutes the court's findings of fact and conclusions of law on this matter.

6 Dated: December 7, 2018

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/s/

8

RONALD H. SARGIS, Chief Judge
United States Bankruptcy Court

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**Instructions to Clerk of Court
Service List - Not Part of Order/Judgment**

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The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith *to the parties below*. The Clerk of Court will send the document via the BNC or, if checked _____, via the U.S. mail.

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Debtor(s)	Attorney for the Debtor(s) (if any)
Bankruptcy Trustee (if appointed in the case)	Office of the U.S. Trustee Robert T. Matsui United States Courthouse 501 I Street, Room 7-500 Sacramento, CA 95814
BBV Profit Sharing c/o The Fuller Law Firm, P.C. Joyce K. Lau 60 No. Keeble Ave. San Jose, CA 95126	