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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re	}	Case No. 08-14522-B-13
Norma B. Rodriguez,		DC No. HDN-1
Debtor.		

**MEMORANDUM DECISION REGARDING EX PARTE
APPLICATION TO SET ASIDE DISMISSAL OF CASE AND
REINSTATE THE AUTOMATIC STAY**

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata and claim preclusion.

This bankruptcy case was dismissed October 9, 2009, based on the Debtor’s failure to make payments due under the chapter 13 plan (the “Plan”). Upon dismissal, the automatic stay terminated by operation of law. The Debtor has filed an ex parte application to set aside that dismissal and reinstate the automatic stay (the “Ex Parte Application”). For the reasons stated below, the Ex Parte Application will be granted subject to the conditions set forth below.

This memorandum decision contains findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a), made applicable to this contested matter by Federal Rule of Bankruptcy Procedure 7052. This court has

1 jurisdiction over this matter under 28 U.S.C. § 1334, 11 U.S.C. § 1307¹ and
2 General Orders 182 and 330 of the U.S. District Court for the Eastern District of
3 California. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A).

4 **Background.**

5 Debtor, Norma B. Rodriguez (the “Debtor”) filed chapter 13 on July 30,
6 2008. The Debtor is represented by Henry D. Nunez, Esq. Michael H. Meyer,
7 Esq., is the chapter 13 trustee (the “Trustee”). The Plan was confirmed October 9,
8 2008.

9 On September 8, 2008, the Trustee filed a motion to dismiss this case
10 pursuant to § 1307 (DC No. MHM-3) because the Debtor failed to make the first
11 payment that was due in August under the yet unconfirmed Plan. That motion was
12 withdrawn by the Trustee on September 25, 2008, after the Debtor made the
13 delinquent payment. On September 22, 2008, the Debtor filed a notice of change
14 of address showing a new address of record on Antioch Avenue in Fresno,
15 California (the “Antioch Ave. Address”). On October 14, 2008, the Trustee filed
16 his second motion to dismiss this case pursuant to § 1307 (DC No. MHM-4) after
17 the Debtor failed to make her September payment. The Debtor eventually made
18 that payment and the motion was withdrawn on October 30th.

19 After a chapter 13 plan is confirmed, the Trustee is not required to notice a
20 motion for dismissal when there has been a material payment default. That
21 process may be prosecuted by the serving of a Notice of Default and Intent to
22 Dismiss (the “NOD”). The serving of a NOD gives the debtor 30 days to cure the
23 default or file and perform a modified plan.

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¹Unless otherwise indicated, all chapter, section and rule references are to the
27 Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy
28 Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the
effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of
2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 When the Debtor failed to make her February 2009 payment, the Trustee
2 filed the first NOD on March 3, 2009. That NOD was served on the Debtor at her
3 Antioch Ave. Address and her attorney on March 6, 2009. In response, the Debtor
4 cured the default. The Trustee filed a second NOD on June 1, 2009, when the
5 Debtor failed to make her May 2009 payment. That NOD was served on the
6 Debtor at her Antioch Ave. Address and her attorney on June 4, 2009. In
7 response, the Debtor cured that default.

8 This case was eventually dismissed based on the Trustee's third NOD
9 which was filed and served on September 1, 2009, after the Debtor failed to make
10 the August 2009 payment. The third NOD was served on the Debtor at her
11 Antioch Ave. Address and her attorney on September 4, 2009. A total of five
12 material defaults have occurred within the first thirteen months after this case was
13 filed. The Debtor failed to respond to the third NOD and the case was dismissed
14 on the Trustee's application on October 9, 2009.

15 **Analysis.**

16 On October 19, 2009, the Debtor filed this Ex Parte Application to set aside
17 the dismissal order. She also prays for reinstatement of the automatic stay. She
18 has offered to tender again the funds necessary to cure the default. Indeed, the
19 Debtor states in a supplemental declaration that she has now tendered the October
20 2009 payment to the Trustee. The Debtor states in her Ex Parte Application that
21 she did not receive the third NOD and did not learn about the default because she
22 "had recently moved addresses and had requested my attorney to file a Notice of
23 Change of Address." The Debtor contends that her attorney's failure to file the
24 notice of change of address and her failure to respond to the third NOD were the
25 result of inadvertence and excusable neglect.²

26
27 ²The Ex Parte Application does not state when the Debtor moved and it does not
28 give her new address. Debtor's counsel still has not filed a new change of address form
and her address of record is still the Antioch Ave. Address. Consequently, this ruling

1 She asks this court to vacate the dismissal order and reinstate the automatic
2 stay as an exercise of its equitable power. However, the first maxim of equitable
3 jurisprudence is “those who seek equity must do equity.” Here, the Debtor has
4 shown a complete disregard for her duties as a debtor in chapter 13. The record
5 summarized above demonstrates a habitual pattern of defaults - five total - since
6 the case was filed. The Debtor seems to believe that the Trustee has nothing better
7 to do than to mail NODs to remind her when the next chapter 13 plan payment is
8 due. Each of the NODs were properly mailed to the Debtor’s address of record,
9 the Antioch Ave. Address, and to the Debtor’s counsel who unfortunately did
10 nothing to represent and protect his client in the matter.

11 The court recognizes that every debtor can occasionally miss a chapter 13
12 plan payment and that dismissal may be a harsh remedy. However, based on the
13 record, this court has no reason to believe that the Debtor will not continue her
14 pattern of defaults if the case is simply reinstated as it was before, and that the
15 whole NOD cycle will not begin again.

16 **Conclusion.**

17 Based on the foregoing, the dismissal order of October 9, 2009, will be
18 vacated subject to the following conditions: The Trustee is no longer required to
19 mail a NOD or file a motion to dismiss to remind the Debtor that a payment is
20 overdue. The Debtor must tender all future payments to the Trustee when they
21 come due for the remaining term of the chapter 13 Plan. If the Debtor fails to
22 make any future payment when it comes due for the remainder of the Plan, the
23 case may be dismissed on the Trustee’s ex parte application without a hearing.

24 The automatic stay will be reinstated provided that Debtor’s counsel shall
25 serve a copy of the reinstatement order on all creditors to be bound by the
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28 will get served by mail to the same address of record where the Trustee served all of the
NODs.

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automatic stay and shall file a proof of service. The reinstated stay shall not be effective until Debtor's counsel files that proof of service. Reinstatement of the automatic stay shall not affect any creditor actions lawfully taken in the gap period between dismissal of the case and the effective date of reinstatement.

Dated: October 30, 2009

/s/ W. Richard Lee
W. Richard Lee
United States Bankruptcy Judge