

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

January 12, 2017, at 9:30 a.m.

1. **17-90002-E-7** **RICHARD BEACH** **MOTION FOR RELIEF FROM**
CCR-1 **Pro Se** **AUTOMATIC STAY O.S.T.**
 1-6-17 [10]
JOHN POTTER VS.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on January 6, 2017. By the court's calculation, 6 days' notice was provided.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----
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The Motion for Relief from the Automatic Stay is granted.
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John Potter and Kristine Potter, as Trustees of the John and Kristine Potter Revocable Trust Dated January 16, 2004, and Stephen Kerr, as Trustee of the Stephen Kerr Revocable Trust, ("Movant") seek relief from the automatic stay with respect to the real property commonly known as 20160 Del Puerto Canyon Road, Patterson, California ("Property"). Movant has provided the Declaration of Daniel Cranston

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to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Copies of the Note and Deeds of Trust are provided as Exhibits 3 and 4. Dckt. 18. Testimony authenticating the Exhibits and providing evidence of the outstanding obligation asserted to be secured by the Property is provided by Declaration. Dckt. 16.

The Motion itself states with particularity (Fed. R. Bank. P. 9013) the following grounds upon which the requested relief is based:

- A. The real property which is the subject of the relief is identified as 20160 Del Puerto Canyon Road, Patterson, California.
- B. Movant's nonjudicial foreclosure sale was scheduled for the day the current bankruptcy case was filed.
- C. It is asserted that cause exists to terminate the automatic stay because the current case was filed in bad faith, Debtor currently being a debtor in a bankruptcy case pending before the United States Bankruptcy Court in the Northern District of California (San Jose Division), case no. 14-54514.
- D. Movant obtained relief from the automatic stay in the Northern District Bankruptcy Case to allow Movant to proceed with the nonjudicial foreclosure sale.
- E. The current bankruptcy case was filed 15 minutes prior to the scheduled nonjudicial foreclosure sale.
- F. Debtor received a Chapter 7 discharge in the Northern District Bankruptcy Case on October 14, 2016.
- G. The filing of a Chapter 7 case in the Eastern District of California merely two months later could not be in good faith.

Motion, Dckt. 10.

Movant also directs the court that in addition to the grounds stated in the Motion, relief is also based on all of the papers and pleading on file in this bankruptcy case, and all of the supporting pleadings filed with the court. It is the Motion in which the grounds must be stated with particularity, and then the factual allegations supported by the evidence submitted and the legal arguments and authorities presented in the points and authorities. As required by Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, the Motion is a separate pleading from each declaration, which is separate from the points and authorities, which is separate from the exhibits (which exhibits may be combined into one exhibit document).

Though the court may discuss some of the other "grounds" sprinkled in the other pleadings, the grounds upon which relief will be granted or denied are those stated in the Motion itself.

Movant presents evidence that it received relief from the automatic stay relating to the Property in Debtor's pending bankruptcy case in the Northern District of California. Order for Relief, Exhibit 6, Dckt. 18. The order terminated the automatic stay effective October 28, 2016. The Order was entered on the Docket on September 6, 2016, effectively giving Debtor two months after the relief from granted to either address the debt or otherwise get Debtor's affairs in order.

Movant has also provided the court with a copy of the Docket for the Northern District Bankruptcy Case. Exhibit 5, Dckt. 18. It shows that Debtor commenced the Northern District Bankruptcy Case on November 6, 2014, as a Chapter 11 case, it was converted to a Chapter 7 case on March 22, 2016, and Debtor obtained the Chapter 7 discharge on October 14, 2016 (two weeks before relief from the stay was effective).

In reviewing the Docket the court notes that Debtor filed a motion to extend the automatic stay in the Northern District Bankruptcy Case. Bankr. N.D. Bankr. 14-54514, Dckt. 18. An order extending the stay was issued by that court. *Id.*, Dckt. 20. This indicates that there was at least one prior bankruptcy case by Debtor which had been pending and dismissed within the year preceding the filing of the Northern District Bankruptcy Case. See 11 U.S.C. § 362(c)(3)(A).

The Docket from the Northern District Bankruptcy Case also shows an entry of October 26, 2016, for a Motion by Debtor to stay the order granting relief from the stay. *Id.*, Dckt. 222. An order denying that motion was entered on October 31, 2016. *Id.*, Dckt. 225.

The current case was commenced on January 4, 2016, by the filing of a petition in this court. Dckt. 1. Debtor states under penalty of perjury that his address is 11700 Foothill Ave, Gilroy, California on the Petition. *Id.* at 2 (Response to Question 5 on Petition.) He then states that he has filed his bankruptcy case in this District because he has lived in the Eastern District of California for the greater part of the prior 180 days than in any other district. *Id.* (Response to Question 6.) Gilroy, California, is not in the Eastern District of California, but in the Northern District of California. Though filing a petition, Debtor did not file: (1) Statement of Monthly Income; (2) Schedules A/B, C, D, E/F, G, H, I or J; (3) Statement of Financial Affairs; or (4) Summary of Assets and Liabilities. Notice of Incomplete Filing, Dckt. 3. Debtor was given an extension to January 10, 2017, to file the documents. *Id.* A review of the court's Docket on December 11 shows that none of the required documents had been filed.

Movant asserts it was about to purchase the Property at a pre-petition Trustee's Sale on January 3, 2017, when the Debtor filed this case. *See* Declarations, Dckts. 15–17; Notices of Trustee's Sale, Exhibits 1 & 2, Dckt. 18.

In the declarations and exhibits Movant argues that the value of the property is less than the liens encumbering the property. Further, the property is not necessary for an effective reorganization. The evidence presented appears to bear out such contentions. The Chapter 7 trustee in the Northern District Bankruptcy Case not selling the property and allowing Movant to get relief from the automatic stay appears to corroborate such a contention. However, the Motion does not state grounds for relief based on the value of the property, the liens, and it not being necessary for an effective reorganization. While this testimony and evidence may bolster the 11 U.S.C. § 362(d)(1) cause grounds stated in the Motion, such are not separate grounds upon which relief was requested in the Motion.

Granting Relief for Cause

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to improperly delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court considers a determination of “cause” for relief from the stay on a case by case basis. *Piombo Corp. v. Castlerock Properties (In re Castlerock)*, 781 F.2d 159, 162 (9th Cir. 1986). As discussed by the Ninth Circuit Court of Appeal, “cause” includes a debtor not commencing or prosecuting a bankruptcy case in good faith. See *Little Creek Development Co., v. Commonwealth Mortgage Corp. (In re Matter of Little Creek Development Co.)*, 779 F.2d 1068, 1071-72 (9th Cir. 1986), stating:

“Bankruptcy is an equitable remedy whereby a debtor is clothed with the protection of an automatic stay, preventing his creditors from acting against him for a period of time, in order to facilitate rehabilitation or reorganization of his finances and to promote a “fresh start” through the orderly disposition of assets to satisfy his creditors. [citations omitted] Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings. See *In re Victory Constr. Co.*, 9 Bankr. 549, 551-60 (Bankr. C.D. Cal. 1981) (containing an excellent historical survey). See, e.g., *Fidelity Assur. Assoc. v. Sims*, 318 U.S. 608, 621, 63 S. Ct. 807, 813-14, 87 L. Ed. 1032 (1943); *A-COS Leasing Corp. v. Wheless*, 422 F.2d 522, 523-25 & n.1 (5th Cir. 1970). Such a standard furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy. Requirement of good faith prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes. Moreover, a good faith standard protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons (i.e., avoidance of liens, discharge of debts, marshalling and turnover of assets) available only to those debtors and creditors with ‘clean hands.’”

The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due and filing this bankruptcy case in an attempt to improperly “stay” the relief from stay ordered in Debtor’s bankruptcy case in the Northern District. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432. Debtor having just received his discharge injunction (after having unsuccessfully attempted to prosecute a Chapter 11 case and having it converted to one under Chapter 7) offers the court no basis for why commencing the current Chapter 7 case is in good faith for any bona fide bankruptcy purpose. Debtor cannot obtain a discharge. A Chapter 7 Trustee (in the Northern District Bankruptcy Case) has already recently concluded that there is no value to attempting to administer the property in a Chapter 7 liquidation.

Movant has provided a properly authenticated copy of the Bankruptcy Court’s Order Granting Relief from the Automatic Stay for cause effective on October 28, 2016, as well as the Notices of Trustee’s

Deed Upon Sale. Exhibits 1, 2, and 6, Dckt. 18. Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or for the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay where the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting the property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include the presence of recent transfers of assets, inability of filing debtors to reorganize, and unnecessary delays due to serial filings. *Id.* The Court takes notice of Debtor's pending bankruptcy case in the Northern District, in which relief from stay was ordered and in which a Trustee's sale was to be conducted on January 3, 2017, the same day that Debtor filed this bankruptcy case.

The relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. With respect to the first, the court concludes that the filing of the current Chapter 7 case in the Eastern District of California, 15 minutes before the commencement of the scheduled nonjudicial foreclosure sale, was part of a scheme by Debtor to hinder and delay Movant from conducting the nonjudicial foreclosure sale as permitted by the judge in the Northern District Bankruptcy Case by the filing of multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking or *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. However, the filing of the current Chapter 7 case cannot have been for any bona fide, good faith reason in light of Debtor having just obtained his Chapter 7 discharge in the prior Northern District Bankruptcy Case. In effect, this is the third case in a series of bankruptcy attempts by Debtor. The first two were in the prior Northern District Bankruptcy Case in which he first attempted to prosecute a Chapter 11 case for five months (from the information on the Docket in that case) and then prosecuted the Chapter 7 portion of that case for the next nine months.

There is nothing to indicate that Debtor has any connection with the Eastern District of California in the filing of this bankruptcy case, other than the real property that Movant is seeking to foreclose on is located in the Eastern District of California. Rather, he continues to be the Debtor in the Northern District Bankruptcy Case. On his petition he lists his address as being in Gilroy, California, which is in the Northern

District of California. While the location of an asset in the District can be a basis for such venue, that is not what was stated by Debtor on the Petition.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Movant has provided sufficient evidence concerning bankruptcy cases being filed to prevent actions against the Property. Movant has provided the court with evidence that Richard Beach has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases.

In granting the 11 U.S.C. § 362(d)(4) relief, the court notes that such is not the end of the game for Debtor. While granting the relief through this case, if Debtor has a good faith, bona fide reason to commence another case while that order is in effect for the Property, the judge in the subsequent case can impose the stay in that case. 11 U.S.C. § 362(d)(4). This would ensure that Debtor, to the extent that some bona fide reason existed, would effectively assert such rights rather than filing several bankruptcy cases which are then dismissed.

Because this court is addressing this Motion on shortened time, the court does not waive the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3).

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by John Potter and Kristine Potter, as Trustees of the John and Kristine Potter Revocable Trust Dated January 16, 2004, and Stephen Kerr, as Trustee of the Stephen Kerr Revocable Trust ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow John Potter and Kristine Potter, as Trustees of the John and Kristine Potter Revocable Trust Dated January 16, 2004, and Stephen Kerr, as Trustee of the Stephen Kerr Revocable Trust, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 20160 Del Puerto Canyon Road, Patterson, California.

IT IS FURTHER ORDERED that, the court finding that the filing of the current Chapter 7 case was part of a scheme by Debtor to hinder and delay Movant

by the filing of multiple bankruptcy cases affecting the Property, relief is granted pursuant to 11 U.S.C. § 362(d)(4). This order granting relief from the stay, if recorded in compliance with applicable State laws governing notices of interests or liens in real property, shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except as ordered by the court in any subsequent case filed during that period.

No other or additional relief is granted.