

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

January 26, 2016 at 1:30 p.m.

|    |   |                               |
|----|---|-------------------------------|
| 1. | <a href="#">15-28603-E-13</a> RICARDO SANCHEZ | MOTION FOR RELIEF FROM        |
|    | TOC-2 Richard L. Sturdevant                   | AUTOMATIC STAY                |
|    |   | 1-6-16 [ <a href="#">34</a> ] |

STONERIDGE WESTBRIDGE  
SHOPPING CENTER, LLC VS.

**Tentative Ruling:** The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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 offers 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 6, 2016. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----.

**The Motion for Relief From the Automatic Stay is granted.**

Stoneridge Westbridge Shopping Center, LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2240 Washington Boulevard, Suite 105, West Sacramento, California (the "Property"). The moving party has provided the Declaration of Randy Bacchus to introduce evidence as a basis for Movant's contention that Ricardo Sanchez ("Debtor") do not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Movant asserts it leased the Property to the Debtor as a tenant. However, the Movant asserts that the Debtor has failed to pay rent. Based on the evidence presented, Debtor would be at best tenant at sufferance. Movant seeks to commence an unlawful detainer action in California Superior Court.

David Cusick, the Chapter 13 Trustee, filed an amended response to the instant Motion on January 12, 2016. Dckt. 42. The Trustee states that the Debtor is delinquent \$5,071.00 under the terms of the plan. To date, the Trustee states that the Debtor has failed to make a payment. Furthermore, the Trustee states that he is objecting to confirmation of the plan due to the Debtor failing to provide tax returns, failure to provide pay advices for the non-filing spouse, failure to provide for secured debts in the plan, inability of Debtor to make payment, failure to provide business documents, and failure to explain retirement loans.

Movant has provided a copy of the lease agreement. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or 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).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at \*8-\*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

The court shall issue an order terminating and vacating the automatic stay to allow Stoneridge Westbridge Shopping Center, LLC, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 2240 Washington Boulevard, Suite 105, West Sacramento, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

Because Movant has established that there is no equity in the property for Debtor and no value in excess of the amount of Movant's claims as of the commencement of this case, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

Though requested in the Motion, Movant has not stated either a contractual or statutory basis for the award of attorneys' fees in connection with this Motion. Further, no amount of attorneys' fees is requested and no evidence of the amount of attorneys' fees is provided.

The court could consider an award of attorneys' fees as part of a "post-judgment" motion (Fed. R. Bankr. P. 7008(b) and 9014), the cost and expense in attorney time and court resources would likely equal or exceed the cost of this Motion for Relief. Because the contractual or statutory basis for legal fees and evidence could have been provided as part of this Motion, it is unlikely that fees would be granted for litigation a second motion in connection with this Contested Matter. While the court could "guess" what a reasonable amount of attorneys' fees could be, the court has no way of knowing whether such amount is the actual attorneys' fees paid by Movant.

Movant is not awarded any attorneys' fees.

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 Stoneridge Westbridge Shopping Center, LLC ("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 vacated to allow Stoneridge Westbridge Shopping Center, LLC and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 2240 Washington Boulevard, Suite 105, West Sacramento, California.

**IT IS FURTHER ORDERED** that the Movant party having established that the value of the Property subject to its lien not having a value greater than the obligation secured, the moving party is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion. Further, no contractual or statutory basis and no evidence in support of an award of attorneys' fees have been provided with the current Motion.

No other or additional relief is granted.

2. [11-20572-E-13](#) JOHANNES GIORGISE  
WW-8 Mark A. Wolff

CONTINUED MOTION FOR ORDER  
AUTHORIZING TRUSTEE TO RELEASE  
FUNDS  
12-18-15 [[284](#)]

**Tentative Ruling:** The Motion for Order Authorizing Trustee to Release Funds has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 18, 2015. By the court's calculation, 25 days' notice was provided. 28 days' notice is required.

The Motion for Order Authorizing Trustee to Release Funds has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion for Order Authorizing Trustee to Release Funds is granted, with the court authorizing the Chapter 13 Trustee to disburse \$3,700.00 of the sales proceeds through the Chapter 13 Plan and the balance of the proceeds to the Debtor.**

Johannes Giorgise ("Debtor") filed the instant Motion for Order Authorizing Trustee to Release Funds on December 18, 2015. Dckt. 284.

The Debtor is seeking the court to authorize the remaining sale proceeds from sale of Debtor's residence and authorize Debtor to cure the default on the mortgage on the rental property the Debtor is seeking to now make his primary residence.

The court on October 7, 2015 authorized that \$13,300.00 of the sale proceeds released to Debtor to pay for limited moving expenses. Dckt. 283.

David Cusick, the Chapter 13 Trustee, filed a reply to the instant Motion on December 29, 2015. Dckt. 296. The Trustee states that the Trustee filed a Motion to Modify the Plan which is set for hearing at 3:00 p.m. on February 2, 2016. The Trustee states that if the instant Motion is granted, it will effectively deny the Trustee's Motion to confirm a modified plan. The Trustee requests that the Motion be continued to be heard in conjunction with the Motion to Modify.

The Trustee argues that the proceeds the Debtor seeks to obtain are non-exempt proceeds from the sale of the real property. Further, there is no confirmed plan providing for payment of these non-exempt assets to the creditor as sought by Debtor.

#### **JANUARY 12, 2016 HEARING**

The court continued the hearing to 10:00 a.m. on January 20, 2016. Dckt. 300.

#### **JANUARY 20, 2016 HEARING**

At the hearing, Debtor and the Trustee reported that they have resolved this Motion and have agreed to have a portion of the monies disbursed through the plan and a portion paid to the Debtor, recognizing the monies as post-petition appreciation arising from Debtor making payments on the secured claim, maintaining, and preserving the property which was sold to generate the monies at issue.

Debtor reports that to avoid the creditor commencing a foreclosure proceeding on the real property being retained post-plan completion by Debtor (a rental property which Debtor will now use as his residence), the agreement between Debtor and Trustee must be immediately addressed as part of this Motion. The Trustee concurs with this assessment. Additionally, February 2016 is the sixtieth month of the Chapter 13 Plan in this case.

Debtor and Trustee are reducing their agreement to writing and will have it promptly filed with the court. The court continued the hearing on this Motion to 1:30 p.m. on January 26, 2016 (specially set) so that an order may be entered hereon and the monies disbursed during the final month of the Chapter 13 Plan in this case.

#### **DISCUSSION**

The grounds stated with particularity in the Motion (Fed. R. Bankr. P. 9013) are:

- a. On November 21, 2012, Debtor filed a second modified plan changing the classification of the claims secured by Debtor's residence and rental properties from Class 1 to Class 2 based on there being loan modifications.
- b. Though not stated in the Motion, the Second Modified Plan was confirmed by order of the court filed on February 7, 2012. Dckt. 210.
- c. Since "filing" the Second Modified Plan, Debtor was served with

**January 26, 2016 at 1:30 p.m.**

dissolution pleadings and has been ordered to pay \$2,700 a month in child and spousal support.

- d. In August 2015 Debtor filed a motion for authorization to sell his residence because he was no longer able to make the monthly payments.
- e. The court granted that motion and authorized the Debtor to sell the residence, but ordered that the sales proceeds be held by the Chapter 13 Trustee.
- f. As noted by the court in the Civil Minutes for the hearing on the motion for authorization to sell the residence, Debtor has not claim an exemption in the residence. Dckt. 273.
- g. In October 2015, Debtor requested that the court authorize the Trustee to disburse a portion of the net sales proceeds to Debtor to pay his personal housing expenses through the remaining term of the Plan (the sixtieth month of the Plan being February 2016).
- h. The court authorized the Trustee to disburse \$13,300.00 to Debtor and ordered the Trustee to apply \$3,500.00 of the proceeds to the Chapter 13 Plan.
- i. Debtor has \$2,500.00 of the \$13,300.00 disbursed by the Chapter 13 Trustee remaining.
- j. Debtor has evicted the tenant from the rental property and now desires to make it the Debtor's residence.
- k. Debtor asserts that he has spent over \$6,000 making repairs to the rental property, as well as other work, such as painting, which he has done himself.
- l. The court's order authorizing the disbursement of the \$13,300 by the Trustee restricted to use of those monies for purposes which do not include any of the repairs to the rental property.
- m. Debtor has fallen behind on the payments on the Class 4 debt secured by the rental property. The Motion asserts that this occurred because the tenant in the property did not pay rent for six months.
- n. On September 29, 2015 a notice of default was filed by the creditor holding the claim secured by the rental property.
- o. Debtor asserts that the remaining monies, in an unstated amount, are necessary for his "financial rehabilitation."
- p. Debtor states that his net income is \$5,545 and that his expenses are essentially unchanged since filing Supplemental Schedule J on October 6, 2015, with the exception that the support payments have increased to \$2,700 (from the \$2,200 listed on Supplemental Schedule J).

Motion, Dckt. 284.

On Supplemental Schedule I Debtor states that his gross income is \$8,535.84. Dckt. 281. Deductions from this gross income include: (1) \$303.80 voluntary contribution for retirement; and (2) \$323.87 for repayment of a 401K loan (effectively paying Debtor himself the money). After withholding, the voluntary retirement contribution, and repaying his 401K loan, Debtor states that the has \$5,545.39 in monthly take-home income.

On Supplemental J Debtor lists \$4,240 (which includes \$100 for electricity/gas; \$50 for water, sewer, garbage; \$150 for phone/cell phone, and \$100 for internet, cable) in monthly expenses (after excluding the rental property expenses). *Id.*

The information from Schedules I and J indicate that Debtor has at least \$1,305.39 in projected disposable income.

The confirmed Second Modified Plan now in effect in this case requires monthly payments of \$585.91, based on how Debtor computed his projected disposable income in 2013. Exhibits 5 and 6, Dckt. 177.

The Trustee has now proposed a Third Modified Plan. Dckt. 290. In addition to the \$585.91 a month in plan payments, the proposed Third Modified Plan provides for a lump sum payment of \$67,894.50, the remaining sales proceeds held by the Trustee from the sale of the residence.

The Trustee reports that under the Plan, the Trustee disbursed plan payments totaling \$47,983.63 as payments to the creditor having the claim secured by the property which was sold, from which the Trustee is holding \$67,894.50 in remaining sales proceeds.

The proposed Third Modified Plan filed by the Trustee provides for at least a 12% dividend to Class 7 creditors holding general unsecured claims. Under the Debtor's confirmed Second Modified Plan Class 7 creditors holding general unsecured claims were promised only a 0.00% dividend.

#### **JANUARY 20, 2016 HEARING**

At the continued hearing on January 20, 2016, the Debtor and Trustee announced that they had reached an agreement whereby a portion of the remaining monies would be paid into the plan (yielding an unsecured claim dividend), and a portion to the Debtor (which takes into account Debtor making the mortgage payments, insurance, and maintenance of the property sold over four years of this plan.

The Trustee and Debtor reported further that granting of the present motion and authorizing the Trustee to disburse a portion of the monies to Debtor are time sensitive because Debtor's former rental property, which Debtor will now use as his residence, has a pending notice of default. This occurred because the tenant ceased paying rent and it took the Debtor six months to have the former tenant evicted. With the other personal and financial pressures Debtor faced, he could not also fund the mortgage payment on the rental property and maintain a roof over his head. Civil Minutes, Dckt. 282.

Debtor and Trustee have agreed that the remaining proceeds from the sale of the 10248 Marlaw Court, Elk Grove, California Property shall be disbursed as follows:

- A. \$3,700.00 by the Chapter 13 Trustee into the Plan in this case, to be disbursed to creditors in one final disbursement; and
- B. \$64,194.50 to the Debtor as his post-plan completion portion of the sales proceeds.

The court finds that notice of this Motion has provided sufficient notice to all creditors and other parties in interest. Cert. of Service, Dckt. 288. Debtor sought all of the monies. Here, the Trustee has been able to retain some of the monies for the benefit of creditors, which will provide for an unsecured claim dividend. Originally, creditors anticipated a 0% dividend under the confirmed plan. Dckt. 173.

During the fifty months of the Plan, Debtor has funded it with \$180,308.61 (which includes \$3,500.00 paid from the sales proceeds). Since the filing of the First Modified Plan on October 9, 2012, the only claims to be paid (after administrative expenses) were the general unsecured claims. The Trustee reported that the general unsecured claims filed in this case total \$17,831.79. Report of Filed Claims, Dckt. 115.

The Second Modified Plan provides that Debtor shall pay \$585.91 for the final 39 months of the Plan. Dckt. 173. During this 39 month period, it is only the general unsecured claims and \$4,500.00 in fees to counsel for Debtor. The monthly plan payments total \$22,850.49. With the additional \$3,700.00 the Second Modified Plan is funded with \$26,550.00 for the final 39 months of the Plan. Assuming maximum administrative expenses, Debtor's counsel is paid \$4,500.00 and the Chapter 13 Trustee is paid \$2,124.04 (assumes an 8% Chapter 13 Trustee fee). This leaves \$19,925.00 for the unsecured claims dividend. It appears that the Trustee and Debtor have agreed to provide a very high dividend to creditors holding general unsecured claims.

The court grants the Motion and authorizes the distribution of the proceeds from the sale of the 10248 Marlaw Court, Elk Grove, California Property in the following amounts:

- A. \$3,700.00 by the Chapter 13 Trustee into the Plan in this case, to be disbursed to creditors in one final disbursement; and
- B. \$64,194.50 (and any additional amounts in excess thereof which are part of the sale proceeds or attributed thereto) to the Debtor as his post-plan completion portion of the sales proceeds.

The court shall issue a minute 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 Order Authorizing Trustee to Release Funds filed by Debtor 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 Motion is granted and the Chapter 13 Trustee is authorized to disburse the remaining proceeds from the sale of the 10248 Marlaw Court, Elk Grove, California Property as follows:

- A. First, \$3,700.00 of the sales proceeds shall be disbursed by the Chapter 13 Trustee into the Plan in this case, which monies shall to be disbursed to creditors in one final disbursement under the confirmed Second Modified Plan in this case; and
- B. Second, \$64,194.50 (and any additional amounts in excess thereof which are part of the sale proceeds or attributed thereto) to Johannes Giorgise, the Debtor, as his post-plan completion portion of the sales proceeds.