

Avelino Santos, Jr. (“Debtor”) commenced this bankruptcy case on August 17, 2016. HSBC Bank USA, N.A., as Trustee on Behalf of Ace Securities Corp. Home Equity Loan Trust and for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2006-HE4, Asset Backed Pass-Through Certificates (“Movant”) seeks relief from the automatic stay with respect to the real property commonly known as 912 Sapphire Circle, Vacaville, California (“Property”). Movant has provided the Declaration of Shilundra Lidell to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Filing of Motion as an Exhibit

Movant filed the Exhibits and Declaration in this matter as one document. That is not the practice in the Bankruptcy Court. “Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents.” Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court’s expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

This also raises another evidentiary question. The Declaration is not being filed as a “declaration,” written testimony provided by a witness with personal knowledge or as an expert (Fed. R. Evid. 601 et seq.), but as a written document (Fed. R. Evid. 901 et seq.). The court can envision a number of situations in which a party may provide the court with an exhibit which is the declaration filed in another proceeding or case as a document not presented for the statements made therein.

Counsel may assert that “it is obvious” to anyone looking at the file that we intend to present this declaration as testimony in support of the motion. Further, counsel may be asserting that “it is really, really easy for the court to dig through the exhibits, find the declaration, analyze the declaration, make the determination that Movant really intends this to be testimony and not a written document filed as an exhibit, recast the exhibit as testimony, and if it really bothers the court that much, then the court can just extract the declaration exhibit and refile it for Movant as a declaration—if it really bothers the court that much.” The response to such rationalization is no, the court does not draft, recast, and make the litigation decision as to what documents and evidence should be filed. Further, if it is that easy, then Movant and counsel can do it right from the start and properly file the declaration as a separate exhibit.

Finally, it is not “obvious” that Movant has filed a declaration as testimony in support of the Motion. A review of the docket shows that Movant has filed a motion, points and authorities, exhibits, notice, and relief from stay information sheet—on its fact it shows that Movant did not file and is not offering a declaration in support of the Motion.

Review of Declaration

The Declaration (Exhibit 4, p.33–35; Dckt. 94) is given by Shilundra Lidell, an employee of Ocwen Loan Servicing, LLC, the loan servicer for the creditor. The testimony includes information obtained from the books and records maintained by Ocwen Loan Servicing, LLC in the course of its business as a loan servicer. The Shilundra Lidell Declaration states that there are three post-petition defaults in the payments on the obligation secured by the Property, with a total of \$4,587.96 in post-petition payments past due.

Declarant further testifies that the unpaid principal on the obligation secured by the deed of trust was \$229,479.24 as of November 22, 2016.

Attached as an exhibit to the declaration which is filed as an exhibit is a chart of the post-petition defaults in payments.

TRUSTEE’S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 30, 2017. Dckt. 98. The Trustee notes that while a plan has not been confirmed, Movant has been provided for in Class 3 of a proposed plan with the Property to be surrendered. The Trustee states that Debtor is delinquent under the proposed plan in the amount of \$1,262.00, having paid \$5,120.00 so far.

DISCUSSION

The Motion seeks relief based on two grounds. First, Movant’s interests in the Property are not adequately protected, and relief should be granted pursuant to 11 U.S.C. § 362(d)(1). To support this, Movant asserts that the three post-petition defaults in payments (totaling \$4,587.96) are sufficient to establish the lack of adequate protection. Alternatively, it is asserted that there is not a sufficient equity cushion to protect Movant’s interests. Movant computes the lack of an equity cushion as follows:

FMV of Property.....	\$393,000.00
Obligation Owed Movant.....	(\$232,887.03)
Costs of Sale (8%).....	<u>(\$ 32,000.00)</u> (rounded up by Court)

Equity Cushion Computed Using Movant’s Numbers.....\$160,112 (69% in excess of Movant Claim).

To be fair, in the Motion Movant asserts that the equity cushion is only \$7,752.97. Motion, ¶ 2; Dckt. 92. However, to get there, Movant has to deduct from the value of the property the obligation owed to the creditor who Movant asserts holds a junior lien against the Property.

For the court to accept this calculation, then the court also has to accept as an admission by Movant that it’s lien is junior to that of Franklin Management Credit Corporation and that Franklin Management is paid first from the proceeds of any sale of the Property.

At the hearing, Counsel for Movant addressed the issue of such admission, stating, XXXXXXXXXXXXXXXXXXXX.

Alternative Grounds for Relief

Movant also asserts that relief is properly allowed pursuant to 11 U.S.C. § 362(d)—no equity in the Property for the Debtor or estate, and the property is not necessary for any effective reorganization. As to the equity, Movant alleges that after payment of the obligations secured by the Property there is \$39,000 of equity in the Property (FMV of \$393,000.00 minus secured claims totaling (\$352,887)). Motion, ¶ 2; *Id.*

With respect to “necessary for an effective reorganization,” Movant fails to assert any allegations for this component. All Movant “alleges” in the Motion is that “Pursuant to 11 U.S.C. §362(d)(2), the debtors have little or no equity in the Property and the Property is not necessary for an effective reorganization.” *Id.* The court’s review of 11 U.S.C. § 362(d)(2) shows that the Code Section does not state that the Property in this case is not necessary for an effective reorganization in this case. Rather, it merely states the statutory requirements for the granting of such relief. On its face, the Motion does not appear to allege that: (1) there is not equity in the property, and (2) the Property is not necessary for an effective reorganization.

Chapter 13 Trustee Statement of Non-Opposition

It appears that the Chapter 13 Trustee may have ridden to the rescue of Movant in this Contested Matter. The Chapter 13 Trustee directs the court to Debtor’s proposed Chapter 13 Plan filed in this case. Second Amended Plan, Dckt. 89. In the Plan the Debtor provides for the two claims secured by the Property by the surrender of the Property—granting the creditors relief from the automatic stay so that they may exercise their rights in the collateral, if they so choose.

This explains why Debtor has not filed an opposition to the Motion. The election of the Debtor to surrender the Property is cause to terminate the stay in this Chapter 13 case. Debtor has elected to give up on the Property, not try to save what equity may exist (taking into account the costs of sale and limited ability to fund a plan).

Granting Relief from Stay

From the evidence provided to the court and the Debtor electing to surrender the Property to allow the creditors to foreclose on their collateral, the court determines that cause exists to grant relief from the stay pursuant to 11 U.S.C. § 362(d)(1).

Request for Attorneys’ Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys’ fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys’ fees or having any obligation to pay attorneys’ fees. Based on the pleadings, the court would either: (1) have to award attorneys’ fees based on grounds made out of whole cloth, or (2) research all of the documents and

California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

If grounds had been shown and evidence provided, the court could have easily made such determination and granted fees (assuming there is a contractual or statutory basis). If an amount of such fees had been included in the motion and prayer, the court and all parties in interest would fairly have been put on notice of the upper limit of such amounts, and the court could have taken the non-opposition and non-response as defaults.

While the court could consider the award of attorneys' fees as a post-judgment motion (Fed. R. Civ. P. 52(b) and Fed. R. Bankr. P. 7052, 9014), the otherwise unnecessary cost and expense of Movant having to file a motion for an award of attorneys' fees for the unopposed Motion in which it made reference to wanting attorneys' fees would well exceed any attorneys' fees that the court would award for a motion such as this. Movant's strategic decision not to provide the court with grounds for and evidence of attorneys' fees has rendered it useless to proceed with a post-judgment motion that would cost more in unawarded (as in unnecessary and unreasonable fees) attorneys' fees.

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.

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 Home Equity Loan Trust And For The Registered Holders Of Ace Securities Corp. Home Equity Loan Trust, Series 2006-HE4, Asset Backed Pass-Through Certificates ("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 HSBC Bank USA, N.A., as Trustee on Behalf of Ace Securities Corp. Home Equity Loan Trust and for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2006-HE4, Asset Backed Pass-Through Certificates, 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 that 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

pro tunc annulment of the automatic stay effective on December 13, 2016, with respect to the real property commonly known as 331 West Chestnut Street, Dixon, California (“Property”). FN.1. Movant seeks such order to validate recordation of the Trustee’s Deed upon Sale that was recorded on December 29, 2016, with Solano County. *See* Exhibit 1, Dckt. 26. The moving party has provided the Declaration of Dan Alexander to introduce evidence as a basis for Movant’s contention that Debtor does not have an ownership interest in or a right to maintain possession of the Property.

FN.1. Movant filed the Motion and Memorandum of Points and Authorities in this matter as one document. That is not the practice in the Bankruptcy Court. “Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents.” Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court’s expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Retroactive Relief from the Stay

As a preliminary matter, Movant is seeking a “retroactive authorization” rather than *nunc pro tunc* authorization. The Ninth Circuit has noted that *nunc pro tunc* approval is not the proper name for seeking retroactive authorization of actions in a bankruptcy case. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 515 n. 4 (9th Cir. 2007). *Nunc pro tunc* amendments are usually used to correct errors in the record and are extremely limited in scope. *Id.* The Ninth Circuit noted that while it is more accurate to call such after-the-fact authorizations “retroactive approvals,” it is customary, but not necessarily correct, to refer to them generically as *nunc pro tunc* in bankruptcy practice. *Id.* The two names stand for the same set of standards and can be used interchangeably. *See, e.g., Atkins v. Wain*, 69 F.3d 970, 974–78 (9th Cir. 1995) (alternating between using *nunc pro tunc* and “retroactive approval” when determining whether a law firm had established exceptional circumstances allowing them to be paid for services to debtor not approved by the court).

Opposition Stated at Hearing

Debtor appeared at the hearing and argued that he had tried to work with the lender, but to no avail. When the court told the Debtor that his bankruptcy case had been dismissed for the failure to file schedules, statement of financial affairs, and a plan, he appeared to be surprised. At that point, the court noted that a woman in the office was giving cues to the Debtor. She then came to the lectern and identified herself. She was not an attorney nor a document petitioner preparer, but worked in the same building as Debtor. She and Debtor asserted that the documents had been “electronically filed.” Because neither are

attorneys, such is not available to a debtor or third-party unless expressly authorized by the Clerk of the Court in this District. L.B.R. 5005.5-1, generally limiting to attorneys electronic filing privileges.

JANUARY 24, 2017 HEARING

At the hearing, court set a final hearing on the Motion at 1:30 p.m. on February 14, 2017. Dckt. 39. The court ordered Debtor to file and serve any opposition pleadings on or before February 10, 2017. Movant was ordered to file and serve any reply by February 13, 2017.

DISCUSSION

No further pleadings have been filed since the January 24, 2017 hearing.

Effect of Foreclosure Sale

In the Points and Authorities, Movant directs the court to California law providing that it is the foreclosure sale itself that terminates the interest of the debtor in the property foreclosed on at the sale. California Code of Civil Procedure § 2924h(c) provides:

For the purposes of this subdivision, the trustee's sale shall be deemed final upon the acceptance of the last and highest bid, and shall be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's deed is recorded within 15 calendar days after the sale, or the next business day following the 15th day if the county recorder in which the property is located is closed on the 15th day. However, the sale is subject to an automatic rescission for a failure of consideration in the event the funds are not "available for withdrawal" as defined in Section 12413.1 of the Insurance Code. The trustee shall send a notice of rescission for a failure of consideration to the last and highest bidder submitting the check or alternative instrument, if the address of the last and highest bidder is known to the trustee.

Cal. C.C.P. § 2924h(c).

Here, the Trustee's deed was recorded On December 29, 2016, which is the fifteenth day after the December 13, 2016 sale. Declaration, ¶ 3, Dckt. 25; Copy of Trustee's Deed, Exhibit 1, Dckt. 26. As provided in Federal Rule of Bankruptcy Procedure 9006(a), unless a statute otherwise specifies, the computation of time is as follows:

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period stated in days or a longer unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Fed. R. Bankr. P. 9006(a).

Applying this rule, the day triggering the fifteen-day period of time is Tuesday, December 13, 2016. Beginning with December 14, 2016, as day one in the fifteen-day period, the fifteenth day is December 28, 2016, one day before the December 29, 2016 recording of the Trustee's deed.

Movant does not have the benefit of the statutorily "deemed perfected" as of the foreclosure sale date.

Annulment of Automatic Stay

A bankruptcy court can exercise its equitable discretion to grant retroactive authorizations when it is appropriate in order to carry out the Bankruptcy Code and when the approval benefits the debtor's estate. *In re Harbin*, 486 F.3d at 522. Retroactive approvals should only be used in "exceptional circumstances." *Atkins*, 69 F.3d at 974.

Movant presents evidence that it is the owner of the Property. Movant asserts it purchased the Property at a pre-petition Trustee's Sale on December 13, 2016, at 2:30 p.m. Based on the evidence presented, Debtor would be at best a tenant at sufferance.

Movant has provided a properly authenticated copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership. Exhibit 1, Dckt. 26. 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).

Though the bankruptcy case was filed on December 13, 2016, Debtor did not record a notice of the bankruptcy petition having been filed with the county recorder prior to the recording of the Trustee's Deed on December 29, 2016.

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*, relief from stay proceedings are summary proceedings that address issues arising only under 11 U.S.C. Section 362(d). No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427, at *8-9 (B.A.P. 9th Cir. Aug. 1, 2005) (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 in a Contested Matter (Fed. R. Bankr. P. 9014).

The court shall issue an order annulling, effective upon the filing of this bankruptcy case, the automatic stay to authorize Alvernaz Partners, LLC, and its agents, representatives and successors, to exercise its rights retroactively to obtain possession and control of the real property commonly known as 331 West Chestnut Street, Dixon, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

In the alternative, Movant has requested relief from the automatic stay with a waiver of the fourteen-day stay imposed by Federal Rule of Bankruptcy Procedure 4001(a)(3) because the case has been dismissed. *See* Dckt. 21 (dismissing the case for failure to timely file documents).

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. The alternative relief requested by Movant does not need to be addressed because the court has granted Movant's request for annulment of the automatic stay.

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 Alvernaz Partners, 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 annulled retroactively effective on December 13, 2016, as of the commencement of this case, to allow Alvernaz Partners, LLC and its agents, representatives and successors, and all persons transferring title to Movant for the following property pursuant to the nonjudicial foreclosure sale conducted on December 13, 2016, to transfer title to Movant, and to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 331 West Chestnut Street, Dixon, California.

No other or additional relief is granted.