

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

February 24, 2015 at 1:30 p.m.

1. 10-41617-E-13 JOSEPH/YVONNE BLAZEK
SCC-1

CONTINUED MOTION TO APPROVE
STIPULATION FOR RELIEF FROM THE
AUTOMATIC STAY
11-25-14 [[54](#)]

COUNTY OF SACRAMENTO VS.

Final Ruling: No appearance at the February 24, 2015 hearing is required.

The court having dismissed the Motion without pursuant to the stipulation of the parties, **the matter is removed from the Calendar.**

2. 14-28947-E-13 ERIC/ZENAIDA PANTONIAL
APN-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY
1-27-15 [[37](#)]

CAPITAL ONE AUTO FINANCE VS.

Final Ruling: No appearance at the February 24, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

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 27, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Eric and Zenaida Pantonial ("Debtor") commenced this bankruptcy case on September 3, 2014. Capital One Auto Finance ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2014 Kia Forte, VIN ending in 8162 (the "Vehicle"). The moving party has provided the Declaration of Shenneka Miller to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Shenneka Miller Declaration provides testimony that Debtor has not made 5 post-petition payments, with a total of \$1733.65 in post-petition payments past due. The Declaration also provides evidence that there are 4 pre-petition payments in default, with a pre-petition arrearage of \$1,466.92.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$20,194.71, as stated in the Shenneka Miller Declaration, while the value of the Vehicle is determined to be \$15,426.00, as stated in Schedules B and D filed by Debtor.

Movant has also provided a copy of the Kelly Blue Book Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. Fed. R. Evid. 803(17).

NONOPPOSITION TO MOTION

Trustee has no opposition to the instant motion.

RULING

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 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 determines that cause exists for terminating the automatic stay since the debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

The court shall issue an order terminating and vacating the automatic stay to allow Capital One Auto Finance, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Movant has not pleaded adequate facts and presented sufficient evidence to

support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

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 Relief From the Automatic Stay filed by Capital One Finance ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2014 Kia Forte("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.

No other or additional relief is granted.

3. 14-29670-E-13 CERRONE PETERSON
BN-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY
1-27-15 [56]

ARGENT MORTGAGE COMPANY, LLC
VS.

Tentative Ruling: The Motion for Relief From the Automatic Stay 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.

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, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 27, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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 are entered.

The Motion for Relief From the Automatic Stay is xxxxx.

Argent Mortgage Company, LLC ("Movant") seeks relief from the automatic stay, to the extent it applies, to Movant defending itself in litigation commenced against Movant by Cedric Peterson, Debtor's husband (who is not a debtor in this bankruptcy case). In the introduction to the Motion, Movant clearly states,

"Movant does not seek to foreclose on the property at issue and is not the owner of the note. Movant does not believe the stay applies to the defense of the claim by Cedric Peterson but out of an abundance of caution, relief from stay is requested to the extent the Court deems the stay to apply to Movant's defense of a claim. The relief from stay requested

is limited to defending against Cedric Peterson's claim."

Motion, Dckt. 56.

The Motion states that Movant originated a loan secured by real property commonly known as 9345 Rocky Lane, Orangevale, California (the "Property") to Cedric Peterson. That loan was assigned soon after it was made, and Movant has no interest in the obligation owing from the loan.

It is asserted that the Debtor is not a party to the loan made by Movant and did not originally list the Rocky Lane Property in this bankruptcy case. FN.1.

FN.1. On the Petition filed in this case the Debtor lists her street address being on Elm Avenue, not the Rocky Lane Property. Dckt. 1. On October 14, 2014, Debtor filed an Amended Petition in which she lists her street address as the Rocky Lane Property and a post office box for a mailing address. Debtor also lists the Elm Avenue address as the location of principal assets of her business. Dckt. 12.

The same day as filing the Amended Petition, Debtor filed her Schedule A. The only real property in which Debtor stated under penalty of perjury she had any interest was the Elm Avenue Property. Dckt. 13. On Schedule I Debtor states that she receives \$1,200.00 a month in wages. No income is listed from any business of the Debtor. *Id.* No business is listed on Schedule B, or any stock or member interest in any entities. *Id.* In response to Question No. 2, Debtor states that she has received \$700.00 in contributions for monthly expenses at the Elm Avenue Property. *Id.*

On November 18, 2014, Debtor amended Schedule A to list an interest (community) in the Rocky Lane Property, and states "Primary Residence." Dckt. 27. On Amended Schedule B the Debtor added a \$30,000.00 claim for mortgage litigation/malpractice. *Id.* Debtor also lists a lawsuit, "Peterson v. Argent Mortgage" as an asset on Amended Schedule B.

Movant has provided the Declaration of Randall Manvitz (Dckt. 58) to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. The Randall Manvitz Declaration states that Cherrone Peterson's ("Debtor") husband Cedric Peterson received a residential mortgage loan secured by the Property from Movant. The loan was then assigned to Ocwen Loan Servicing, and Movant currently claims to have no interest in the loan. The Debtor is admittedly not party to the loan and is not on the deed of trust.

Cedric Peterson filed a lawsuit against Movant in 2008 alleging a violation of the Truth-In-Lending Act and seeking rescission and damages. On two occasions Cedric Peterson settled and released Movant from all claims in exchange for a loan modification. However, Debtor's husband failed to make a single payment with the arrears stated in Exhibit 2. Movant argues that Cedric Peterson has a current arrearage of \$1.3 million with no chance of repaying this or the other approximately \$2 million in debt of the Petersons.

The Movant makes it clear that they are not pursuing a claim against the

Debtor and is not seeking to enforce or perfect a lien, does not have a lien on the property, and has no interest in the note. Movant is seeking a relief from stay to defend against Cedric Peterson's claim for rescission and damages.

Movant asserts cause as their grounds for seeking relief from stay because the lawsuit against them must be resolved without further delay. Movant claims "because there is no clear definition of what constitutes cause, discretionary relief from the stay must be determined on a case by case basis." *In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985).

Movant argues that cause exists because the Debtor and Debtor's spouse have instituted a number of tactics to delay resolution of his claim which has been pending since 2008. Movant asserts that the filing of the instant bankruptcy was designed to hinder Movant's discovery efforts into convictions of felony financial fraud and felony welfare fraud of Debtor and felonious criminal activities involving the financial services and mortgage loan businesses owned by Debtor and Debtor's husband.

Mr. Manvitz is an attorney with Movant's law firm that is appearing in this contested matter. In the start of his declaration, Mr. Manvitz raises doubt as to the credibility of his testimony in that he says the testimony is either based on his personal knowledge, or merely on information and belief. But he believes that the information he does not know on personal knowledge is true. Declaration, Dckt. 58. Federal Rule of Evidence 601 and 602 require non-expert witnesses to have personal knowledge of the facts to which they seek to testify.

Mr. Manvitz also states that the matters he testifies to, even if he does not have personal knowledge, can be found in the Peterson v. Argent action pending in the Northern District of Illinois. Therefore, he suggests that the court should just take judicial notice of his testimony because he is telling the court about things that may be in another court's file. The requirements for Judicial Notice are more than a witness testifying that documents can be found elsewhere. See Fed. R. Evid. 201. For documents in another court's file, if a witness cannot personally authenticate them (such as having been prepared by that person's law firm or served on that law firm by the opponent), the Federal Rules of Evidence provide a method of authentication in Rule 902(4) (which is not taking Judicial Notice of a witness' testimony because the witness says that it is in another court's file).

From the declaration the court cannot tell what facts, if any, are made by Mr. Manvitz based on his personal knowledge. He does not even testify if he is, or is not, an attorney for Movant in the Northern District of Illinois action.

Movant's Exhibits

Movant has dumped on the court three exhibits. Dckt. 60. None of the exhibits are authenticated.

Mr. Manvitz testifies that Exhibit 1 is a copy of a complaint filed by Cedric Peterson against Movant. He does not provide any testimony as to how he has any personal knowledge of this document or how he can authenticate it.

Mr. Manvitz states that Exhibit 2 is a copy of a payment quote from Ocwen

Loan Servicing. He offers no testimony why or how he has personal knowledge of this exhibit. It is not addressed to Mr. Manvitz. It is addressed to a "Tiffany B. Till," at an email address at lockelord.com. While it appears that lockelord could be an email address for someone at the Locke Lord, LLP law firm, it does not appear to tie back to Mr. Manvitz or his law firm.

Mr. Manvitz also testifies under penalty of perjury, based on his personal knowledge, that Exhibit 3 is a copy of a deposition transcript concerning Cedric Peterson. There is nothing in the transcript indication that Mr. Manvitz has any personal knowledge of the deposition (such as being listed as an attorney taking or participating in the deposition). Mr. Manvitz does not testify that he has any personal knowledge of the deposition.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on January 28, 2015. Dckt. 63. The Trustee states that he does not object to the motion as long as it is limited to Movant defending the claim by Debtor's non-filing spouse, Cedric Peterson. The Trustee believes that the Debtor is protected by the automatic stay even if her interest is only possessory. (*In re Perl*, No. 13-1328 (B.A.P. 9th Cir. May 30, 2014)).

DEBTOR'S OPPOSITION

Debtor filed an extensive opposition to the instant Motion seeking confirmation that the automatic stay does not apply to Movant defending itself in the litigation being prosecuted by Cedric Peterson (which litigation is listed on Amended Schedule B.). No evidence is presented in opposition by Debtor and she fails to testify in support of her own cause. Additionally, as shown from the summary below, Debtor never opposes relief being granted or confirmed that the stay does not apply to Movant defending itself in the on February 10, 2015. Dckt. 82. The Debtor objects on the following grounds:

1. Movant lacks standing. The underlying note has been transferred to Ocwen Loan Servicing, LLC whom is currently reviewing a loan modification application which is authorized by the documents transferring the servicing rights.

The Debtor points to the Motion where the Movant states: "The loan was assigned soon after origination, and Movant has no interest in the loan. Dckt. 46 (Decl. Of Ocwen Loan Servicing)." The Debtor argues that this is an admission that the Movant lacks standing to be granted the relief sought in Motion.

2. The Motion lacks evidentiary support. The Movant provides in the Motion excerpts from the deposition of Debtor's husband which are outside the context of the hearing, offered to prove various assertions which are hearsay and thus are inadmissible.

The Debtor further argues that senior counsel has made assertions that he does not have personal knowledge, as these too are inadmissible double hearsay. If there is an action which the Debtor's husband is a plaintiff to, no relief from stay is needed by the Movant to defend such an action, only actions against the Debtor are restricted.

It appears that the Debtor is arguing that the "excerpts" from the Declaration of Randall Manvitz are hearsay and inadmissible as no proof has been offered that the declarant was personally at the deposition and cannot testify to what was said.

3. The Motion lacks cause for relief as a loan modification is pending. The Debtor has submitted a loan modification application to the holder of the note, Ocwen Loan Servicing, LLC. The Debtor asserts that this pending modification makes the relief sought premature.
4. Cause is lacking at this time. Debtor argues that no cause exists because while the Debtor does not have equity in the Property, the second prong for cause is not met. The Debtor's plan calls for payments through the servicer, Ocwen Loan Servicing, LLC. The Plan calls for payments to adequately protect the secured creditor pending a loan modification, at an amount to meet the 31% target payment according to the HAMP Loan Modification Program. Furthermore, the action being sought relief to prosecute does not involve the Debtor, the property, or the bankruptcy estate.

While hoping to exploit on the evidentiary shortcomings of the Movant, Debtor ignores the relief requested - defense presented in the Northern District of Illinois action against Movant by Cedric Peterson.

MOVANT'S REPLY

Movant filed a reply on February 17, 2015. Dckt. 84. The Movant accurately argues that there is no opposition to the relief requested. Movant requests an order confirming that the automatic stay does not apply to Movant's defense of a lawsuit by Debtor's non-filing husband or alternatively, granting relief from the automatic stay so that Movant may defend the law suit.

While the Debtor's opposition argues that Movant should not be granted relief from stay to foreclose on the Property for a host of reasons, the arguments are irrelevant because relief from stay is not requested to foreclose but only to defend the lawsuit. Movant argues that the Debtor does not oppose the request by Movant for an order confirming that the stay does not apply to the defense of the lawsuit and instead argues that such relief is not necessary.

The Movant reiterates that the relief sought is:

1. Stating that the automatic stay does not apply to Movant's defense of the claim by Cedric Peterson, Case No. 1:08-cv-07281 pending in the Northern District of Illinois or alternatively,
2. Terminating the automatic stay for the limited purpose of permitting Movant to defend the lawsuit; and
3. That the 14 day waiting period prescribe by Fed. R. Bankr. P. 4001(a)(3) be waived.

DISCUSSION

Debtor's opposition raises interesting issues, and concerns, for the court

and other parties in interest. While full of smoke and bluster, Debtor never actually opposes the relief from stay as requested. The court does not base its ruling on the contentions, arguments, and allegations about Cedric Peterson's conduct, or what he would, or would not, answer in a deposition.

The Motion does not allege that Debtor or Cedric Peterson has asserted that defending itself in the Northern District of Illinois action would be a violation of the stay in this case. However, it appears that there would be little reason for requesting the present relief if such a contention had not been raised, alluded to, or feared based on prior dealings in such litigation. Alternatively, Movant may be so cautious that it wants to avoid any possible, tangential violation of the stay.

The action at issue is asserted to have been commenced by Cedric Peterson against Movant. To the extent that the Debtor claims an interest in that litigation, she is standing in the shoes of the plaintiff with Cedric Peterson. No act or action is asserted as being taken by Movant against the Debtor, property of the Debtor, or property of the bankruptcy estate. It is well established law in the Ninth Circuit that the automatic does not apply to a party defending itself against claims being asserted by the debtor, debtor in possession, or trustee. See *Parker v. Bain et. al.*, 68 F.3d 1131, 1140-1141 (9th Cir. 1995); *In re Way*, 229 B.R. 11, 13 (B.A.P. 9th Cir. 1998); *In re White*, 186 700 (B.A.P. 9th Cir. 1995); *In re Merrick*, 175 B.R. 333 (B.A.P. 9th Cir. 1994). As discussed in these cases, this includes attorneys' fees, costs, and sanctions which may be awarded the defendant against the debtor, debtor in possession, or trustee. FN.2.

FN.2. The court notes that no points and authorities was filed in support of the motion and the opposition is devoid of any legal authorities. Possibly counsel for the respective parties believed that the law was so "obvious" that everyone in these judicial proceedings would know that. Possibly if either had obtained and asserted the well established legal authorities to the other, the motion may not have been necessary.

This court is also cognizant that non-bankruptcy judges are careful to not allow proceeds to continue which might violate the stay. In some situations the non-bankruptcy judge will await an order from the bankruptcy judge that there is no stay in effect or the stay has been modified to allow the non-bankruptcy court action to proceed.

The automatic stay in the Cherrone Peterson bankruptcy case, 14-29670, does not apply to Movant's defense in the Northern District of Illinois action commenced against it by Cedric Peterson. Though Debtor's evidentiary objections are valid, they are of no effect as to the relief requested. Debtor does not oppose the motion requesting the court to confirm that the automatic stay does not apply to Movant defending itself.

The Motion is granted.

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 Argent Mortgage Company, 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) in the Cherrone Peterson bankruptcy case, Bankr. E.D. Cal. 14-29670, do not apply to the Argent Mortgage Company, LLC defending the claims against it in the action commended by Cedric Peterson now pending before the United States District Court for the Northern District of Illinois, Case No. 1:08-cv-07281. The automatic stay not applying such defense, no further order is appropriate.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived and this order is effective upon it being issued by the court.

No other or additional relief is granted.