

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

March 9, 2017, at 10:00 a.m.

1. **16-24854-E-7** **VERNON DECK** **MOTION FOR RELIEF FROM**
RAS-1 **AUTOMATIC STAY**
 12-19-16 [40]

WELLS FARGO BANK, NATIONAL
ASSOCIATION VS.

**APPEARANCE OF MATTHEW CLARKE,
ATTORNEY FOR WELLS FARGO BANK, N.A., TRUSTEE
REQUIRED FOR MARCH 9, 2017 HEARING**

TELEPHONIC APPEARANCE PERMITTED

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.

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 7 Trustee, and Office of the United States Trustee on February 8, 2017. By the court's calculation, 29 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is denied without prejudice.

Vernon Deck (“Debtor”) commenced this bankruptcy case on July 25, 2016. Ocwen Loan Servicing LLC, as servicer for Wells Fargo Bank, National Association, as Trustee for Option One Mortgage Loan Trust 2003-1, Asset-Backed Certificates, Series 2003-1 (“Movant”) seeks relief from the automatic stay with respect to the real property commonly known as 1124 Hawthorne Loop, Roseville, California (“Property”).

REVIEW OF MOVANT’S PLEADINGS

The court begins with a review of Movant’s pleadings. Movant has appeared many times in this court and generally has had its counsel comply with the Local Bankruptcy Rules and the procedures in this court. The court has noticed that the pleading practices of Movant have decreased in quality generally for all counsel it is using. It may well be that this is a directive from Movant to its attorneys that they will do it “The Wells Fargo Bank Way, hang any rules of the court.”

First, Movant has filed a thirty-eight-page document as its “Motion.” Dckt. 40. This “Motion” actually consists of the following documents:

- A. Page 1, Portion of Motion titled “Relief From Stay Information Sheet.”
- B. Pages 2–3, Portion of Motion titled “Motion.”
 - 1. The property that is the subject of the “Motion” is identified as 1124 Hawthorne Loop, Roseville, California (“Property”).
 - 2. Cause pursuant to 11 U.S.C. § 362(d)(1) exists to terminate the stay because:
 - a. The Debtor has defaulted in payments as of October 1, 2011;
 - b. The outstanding payment on the obligation owed Movant is \$163,357.01; and
 - c. Movant’s interests are not protected by an equity cushion (with the value and liens addressed in the section of the “Motion” asserting grounds for relief pursuant to 11 U.S.C. § 362(d)(2).
 - 3. Relief is proper pursuant to 11 U.S.C. § 362(d)(2) based on there being no equity in the Property, and it is not necessary for an effective reorganization because:
 - a. The fair market value of the Property is \$404,885.00
 - b. Obligation owed to Movant is (\$411,850.80); and
 - c. While this shows a \$7,000 “equity,” reasonable costs of sale exhaust any such “equity.”
 - 4. Even though there is no equity in the Property, Movant seeks the recovery of attorneys’ fees.

- a. The Motion does not state any contractual or statutory basis for such fees.
 - b. The Motion does not state any amount of fees requested.
- C. Pages 4–8, Portion of the Motion titled “Memorandum Points and Authorities.”
1. This “Points and Authorities” contains extensive factual allegations and what some would consider “grounds” that have to be stated with particularity in the “motion.” Fed. R. Bankr. P. 9013.
 2. This “Points and Authorities” contains a separate subsection titled “Legal Argument.”
 3. The “Points and Authorities” does not provide any “law” in support of the general request for attorneys’ fees in the “Motion” portion of these documents filed as Docket Entry 40.
- D. Pages 9–11, Portion of the Motion titled “Declaration in Support of Motion.”
1. The declaration is provided by Sonja Manderville, who is employed as a “Contract Management Coordinator” (an undefined position) by Ocwen Loan Servicing, LLC.
 2. She testifies that Ocwen Loan Servicing, LLC is the servicer for Wells Fargo Bank, N.A.
 3. In giving this testimony, she states that she has reviewed the records of Ocwen Loan Servicing, LLC, but does not explain how she, as a “Contract Management Coordinator” is personally responsible for or deals with the debt that is the subject of this Motion.
 4. Ms. Manderville states under penalty of perjury that “Co-Signer HEATHER SUMMERBY has executed and delivered or is otherwise obligated with respect to that certain promissory note referenced in the Motion”

At this juncture, the court notes that the “promissory note referenced in the Motion,” which Ms. Manderville does not specifically identify, is referenced in the Motion as “The Note is secured by a recorded deed of trust (the ‘Deed of Trust’) encumbering the real property located at 1124 Hawthorne Loop, Roseville, California 95678 (the ‘Property’). (See Exhibits, Exhibit 2).” Portion of Pleading titled “Memorandum of Points and Authorities in Support of Motion for Relief from the Automatic Stay,” Dckt. 40 at 5.

The exhibits are the Portion of the “Motion” found on pages 12–36. Dckt. 40. None of the “Exhibits” are marked or identified by exhibit number. There is a document titled “Deed of Trust” found on pages 17–27.

The Deed of Trust is dated November 1, 2002. It is not a certified copy of the Deed of Trust. Fed. R. Evid. 901, 902. Ms. Manderville does not state in her declaration how she has personal knowledge that in November of 2002, Ms. Summerby executed and delivered this Deed of Trust to anyone. Fed. R. Evid. 601, 602.

Ms. Manderville goes further, to state under penalty of perjury her legal opinion that Heather Summerby is “otherwise obligated” on that Deed of Trust. Ms. Manderville does not indicate any basis for such a legal opinion on her part or why such opinion testimony is proper. Fed. R. Evid 701, 702.

- a. Ms. Manderville goes further to testify as to the defaults and provide a detailed history of missed payments by Debtor. While this information is stated to have come from the books and records of Ocwen Loan Servicing, LLC, she does not explain how she, as a “Contract Management Coordinator” (which sounds in the nature of an administrative, sales position) has actual responsibility for the servicing of the debt at issue.
- b. While Ms. Manderville states under penalty of perjury that the information is taken from the Ocwen Loan Servicing, LLC records and that such records were:
 - (1) made near or at the time of occurrence;
 - (2) by people with personal knowledge of the information in the records;
 - (3) kept in the court of Ocwen Loan Servicing, LLC’s regularly conducted business activities; and
 - (4) it is the regular course of Ocwen Loan Servicing, LLC’s business;

it appears that the information may well not be from records made by Ocwen Loan Servicing, LLC, by people that Ocwen Loan Servicing, LLC knows has personal knowledge, were not kept by Ocwen Loan Servicing, LLC, and was not created by Ocwen Loan Servicing, LLC in the regular course of its business.

The Deed of Trust was executed in November 2002. There is no evidence that this was part of Ocwen Loan Servicing, LLC’s record or that it was involved in the loan at that time. Ms. Manderville provides testimony of defaults in payments dating back to October 1, 2011. There is no evidence that Ocwen Loan Servicing, LLC was involved in the servicing of this loan in October 2011.

The Allonge to the Note, Page 16 of Pleading Titled Motion, is undated and executed by Option One Mortgage Corporation, appearing to endorse the Note to Wells Fargo Bank Minnesota, N.A., as Trustee. The uncertified, unauthenticated document titled “Assignment of Deed of Trust” is dated October 23, 2012, and purports to have “Sand Canyon Corporation f/k/a Option One Mortgage Corporation assign to Wells Fargo Bank, N.A., as Trustee, the Deed of Trust that is the subject of this Motion. Page 28 of Pleading Titled

Motion. It is unclear the effect of the Allonge endorsing the Note to “Wells Fargo Bank Minnesota, National Association, as Trustee.”

The testimony under penalty of perjury by Sonja Manderville raises serious questions as to the veracity of her testimony. She has shown no basis for having personal knowledge of the events occurring in 2002. Further, her testimony that all of the information in the records of Ocwen Loan Servicing, LLC was created by Ocwen Loan Servicing, LLC at the time the events occurred as part of the regular business practices of Ocwen Loan Servicing, LLC is not credible (and appears to be intentionally inaccurate).

Counsel for Wells Fargo Bank, N.A. has failed to comply with the basic pleading requirements under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules. As required under Federal Rule of Bankruptcy Procedure 9013, it is the motion that must state with particularity the grounds upon which relief is requested. While it is true that the Motion does state some grounds, it appears that many more are hidden in the Points and Authorities and Declaration.

Further, under Local Bankruptcy Rule 9004-1 and the Revised Guidelines for the Preparation of Documents, the motion, points and authorities, each declaration, and the exhibits document (which exhibits may be combined into one document) are each filed as separate documents with the court, not one huge “Motion.”

The court has previously had Ocwen Loan Servicing, LLC and other counsel representing it, with senior management and declarants from Ocwen Loan Servicing, LLC appear in person at the hearing, to address deficient practices and insufficient declarations. It appears that such practices have been renewed, but with new counsel. The court has also ordered Wells Fargo Bank, N.A. to appear through senior management to explain the practices it was engaging in with counsel by filing deficient pleadings as an apparent manner of course.

Before bringing in Ocwen Loan Servicing, LLC, Wells Fargo Bank, N.A., and counsel into court to address these issues, the court allows counsel to appear telephonically to address the above and specifically the following:

- A. Why counsel has failed to comply with the requirements of Local Bankruptcy Rule 9004-1 and the Revised Guidelines for the Preparation of Documents.
- B. The basis for Sonja Manderville testifying under penalty of perjury as to events occurring in 2002.
- C. The basis for Sonja Manderville testifying under penalty of perjury as to the transactions stated to have occurred in 2011 and thereafter.
- D. The duties of Sonja Manderville as a “Contract Management Coordinator” and how they qualify her as having personal knowledge to provide the testimony, including testimony as to the books and records of Ocwen Loan Servicing, LLC.

- E. In the absence of a person having personal knowledge concerning the documents, the possession of the documents, or the retention of documents by Wells Fargo Bank, N.A., why the court was not provided with a certified copy of the Deed of Trust and Assignment of the Deed of Trust.
- F. The basis for Wells Fargo Bank, N.A. and counsel requesting an award of attorneys' fees when: (1) no legal basis is provided for an award of fees and (2) no evidence of the amount of attorneys' fees requested are provided.

DISCUSSION

From the evidence provided, the court cannot determine whether Wells Fargo Bank, N.A. is entitled to relief from the automatic stay. The Manderville Declaration appears to be "testimony by proxy," with Ocwen Loan Servicing providing a "dummy declarant" who has no personal knowledge.

The Motion is denied without prejudice.

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 Ocwen Loan Servicing LLC, as servicer for Wells Fargo Bank, National Association, as Trustee for Option One Mortgage Loan Trust 2003-1, Asset-Backed Certificates, Series 2003-1 ("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 Motion is denied without prejudice.