

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

March 10, 2015 at 1:30 p.m.

1. [14-31509](#)-E-13 BOBBY CHRISTIAN AND SEAN MOTION FOR RELIEF FROM
EJS-1 WARREN AUTOMATIC STAY
2-23-15 [[28](#)]
ARBOR POINTE APARTMENTS VS.

Final Ruling: No appearance at the March 10, 2015 hearing is required.

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

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 February 23, 2015. By the court's calculation, 15 days' notice was provided. 28 days' notice is required. Defect waived by responses filed.

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.

Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The Motion for Relief From the Automatic Stay is granted.

Arbor Pointe Apartments ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 9750 Old Placerville Road, #165, Sacramento, California (the "Property").

The moving party has not provided a Declaration to introduce evidence as a basis for Movant's contention that Bobby Christian and Sean Warren ("Debtors") do not have an ownership interest in or a right to maintain possession of the Property. Instead, Movant presents a complaint and verification of the complaint as evidence that it is the owner of the Property, and that the Debtors are delinquent on their rent.

No declaration is provided authenticating any of the Exhibits filed in Support of the Motion. Dckt. 30. Instead, Movant merely tells the court to take judicial notice of documents filed in other court.

March 10, 2015 at 1:30 p.m.

- Page 1 of 7 -

David Cusick, the Chapter 13 Trustee, filed a non-opposition on February 24, 2015.

The Debtors filed a limited opposition on March 3, 2015. Dckt. 33. The Debtors state that the Debtors' have no opposition, absent request not to waive Rule 4001 and to allow the Debtors' time to relocate.

DISCUSSION

The Motion fails to meet the notice requirements set forth by Local Bankruptcy Rule 9014-1(f)(1). Under Local Bankruptcy Rule 9014-1(f)(1) the Moving party must give all interested parties 28 days' notice, but here Movant only provided 15 days'.

Adhering to the time requirements for notice and filing are essential to the judicial efficiency of the Court. Furthermore, it provides the interested parties in the matter to properly respond and plead themselves. If the Movant was unable to provide proper notice under Local Rule 9014-1(f)(1), Movant could provided notice under Local Rule 9014-1(f)(2), which only requires 14 days' notice.

On this defect in service point, Debtor and the Chapter 13 Trustee have extended the courtesy to Movant in responding and stating no opposition to the Motion.

Additionally, the Movant has failed to provide a declaration to authenticate the evidence provided. Instead, Movant requests (without citing any authority for this proposition) that the court take "Judicial Notice" of pleadings filed and testimony given in other judicial proceedings. Judicial Notice is not a magical talisman which when uttered renders whatever documents referenced admissible and credible.

Federal Rule of Evidence 201 provides that a federal court may take "Judicial Notice" of adjudicative facts as follows:

"Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

There is no showing that the "facts" upon which the Motion is based fall within the limits of Federal Rule of Evidence 201. Instead, it appears that Movant is attempting to slip in statements made in another judicial proceeding in place of actually providing testimony under penalty of perjury in this case.

No basis has been provided for the proposition that testimony in one judicial proceeding becomes testimony under penalty of perjury in another judicial proceeding.

The court also notes that the verified complaint for which "Judicial Notice" is requested has been verified by Movant's non-bankruptcy counsel. Counsel provides the verification, not based on his personal knowledge, but merely because a person with actual personal knowledge is absent from the county in which the non-bankruptcy attorney maintains his office. This is a state court pleading procedure which dates back before the days of overnight mail, facsimile machines, email, and electronic filing of pleadings. Little credible reason exists in the 21st Century for attorneys verifying complaints when they do not have personal knowledge merely because the person with the knowledge is not in the same county as the attorney.

Though there is a failure of Movant to provide evidence in support of the Motion, Debtor and the Trustee extend the courtesy of not opposing relief for which they do not perceive a good faith, bona fide purpose.

While not properly authenticated, Movant commenced an unlawful detainer action in California Superior Court, County of Sacramento, case no. 15UD00571. Exhibit A, Dckt. 30.

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 Arbor Pointe Apartments, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 9750 Old Placerville Road, #165, Sacramento, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The Movant has not alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 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 Arbor Pointe Apartments ("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 Arbor Pointe Apartments and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 9750 Old Placerville Road, #165, Sacramento, California.

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.

2. [14-29284-E-7](#)
DNL-3

CHARLES MILLS
Lucas Garcia

CONTINUED MOTION TO SELL AND/OR
MOTION FOR COMPENSATION FOR
KELLER WILLIAMS REALTY,
BROKER(S)
1-29-15 [[196](#)]

Tentative Ruling: The Motion to Sell Property 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, creditors, parties requesting special notice, and Office of the United States Trustee on January 29, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property 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 hearing on the Motion to Sell Property is XXXXXX
--

The Bankruptcy Code permits the Kimberly Husted, Chapter 7 Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. 201 Rua Esperanza, Lincoln, California

The proposed purchaser of the Property is Ibrahim Salama and Sousan Herzallah and the terms of the sale are:

1. Purchase price is \$2,100,000.00 (all cash) payable as follows:

- a. \$50,000.00 initial deposit; and
 - b. The balance of \$2,050,000.00 due at close of escrow
2. The transfer of the Property shall be "as is" and "where is" without representation or warranty.
 3. The Trustee shall be responsible for applicable prorations and all closing costs, including escrow, title, and recording fees; transfer taxes/fees; HOA fees; and an amount not to exceed \$900.00 for a one-year warranty plan;
 4. The sale is subject to overbidding through conclusion of the sale hearing

The Trustee argues that the proposed sale has a sound business justification and is in the best interest of the estate. The Trustee estimates that the estate will benefit from the net sale proceeds in the amount that will exceed \$100,000.00. The estate will also benefit from an efficient administration of the Property, which is particularly important given the creditor Lackeys' pending relief from stay motion. The Trustee has received no higher or otherwise better offers.

The Trustee also requests that the court approve the Broker's compensation in the amount of 4% of the gross sale proceeds, in the amount of \$84,000.00.

Furthermore, the Trustee requests reimbursement for the expenses advanced by the Trustee in the amount of \$3,666.00 in an effort to protect the estate's interest in the Property following the conversion. The Trustee advanced \$1,296.00 to cure a property insurance deficiency, \$605.00 to change the locks on the Property, and \$1,765.00 to the City of Lincoln Utilities Department to cure a deficiency on the water bill and re-connect the water services.

Lastly, the Trustee requests that the 14 day stay period imposed by Fed. R. Bankr. P. 6004(h) be waived so the sale can be completely immediately upon approval.

CREDITOR'S STATEMENT IN SUPPORT

Joseph and Stacy Lackey ("Creditors") filed a statement in support on February 5, 2015. Dckt. 202. The Creditors state that they believe the terms of the proposed sale are reasonable and that the timely sale of the Property is in the best interest of the estate.

FEBRUARY 26, 2015 HEARING

At the hearing the Chapter 7 Trustee reported that the buyer had communicated that buyer did not want to proceed with the contract. The hearing was continued to allow the real estate broker to communicate with several other potentially interested parties, as well as the Trustee to communicate the possible breach of contract claims which she believes could exist for the failure to complete the contract. The court continued the hearing to afford the Trustee and broker the opportunity to have competing overbidders for the March 10, 2015 hearing.

MARCH 10, 2015 HEARING

At the hearing, -----

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 to Sell Property filed by Kimberly Husted, Chapter 7 Trustee ,having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED xxxx