UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

March 29, 2017, at 2:00 p.m.

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1. **15-26710-E-13** **ROBERTO RAMIREZ** **FURTHER HEARING RE: MOTION FOR**
JCW-1 **Pro Se** **RELIEF FROM AUTOMATIC STAY**
12-4-15 [79]

NATIONSTAR MORTGAGE, LLC
CASE DISMISSED: 01/21/2016

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.

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)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Chapter 13 Trustee on December 4, 2015. By the court's calculation, 39 days' notice was provided. 28 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)(3). 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 offer 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. At the hearing ----------.

The Motion for Relief from the Automatic Stay is granted.

Nationstar Mortgage LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2440 Beaufort Drive, Fairfield, California (the "Property"). Movant has

provided the Declaration of Raquel Bryan to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Bryan Declaration states that there are 2 post-petition defaults in the payments on the obligation secured by the Property, with a total of $2,398.56 in post-petition payments past due.

The Movant seeks relief pursuant to 11 U.S.C. § 362(d)(4). The Movant also requests that the stay be annulled to validate the foreclosure sale which took plan on August 26, 2015, a day after the filing of the instant petition. The Movant asserts that the Movant was unaware of the bankruptcy filing.

DEBTOR'S OPPOSITION

Opposition has been filed by Roberto Ramirez ("Debtor") on January 6, 2016. Dckt. 92. The Debtor asserts that he has attempted to discuss with Movant adequate protection payments but has not received a response. Furthermore, the Debtor asserts that the court should not grant retroactive relief from the stay. The instant case was filed on August 25, 2015. On August 26, 2015, the Movant performed a foreclosure sale of the Property. The Debtor asserts that this was a violation of the automatic stay.

Furthermore, the Debtor asserts that the Movant has not shown proper grounds pursuant to 11 U.S.C. § 362(d)(4) because the existence of prior cases in and of itself does not allege sufficient grounds for 11 U.S.C. § 362(d)(4) relief.

Lastly, the Debtor asserts that the Movant violated the California Home Owner Bill of Rights.

Debtor did not file an opposition, other than a statement of his dispute with Movant. Dckt. 92. In it Debtor states that he faxed a notice of the August 25, 2015 bankruptcy filing to National Mortgage within hours of the bankruptcy case being filed.

A substantial and complex opposition, in number of documents provided, was filed as Opposition. The court did previously, and does again, consider the Opposition, including documents.

TRUSTEE'S NONOPPOSITION

David Cusick, the Chapter 13 Trustee, filed a non-opposition on December 16, 2015.

JANUARY 12, 2016 HEARING

At the hearing, the court granted the Motion for Relief pursuant to 11 U.S.C. § 362(d)(4), annulled the automatic stay effective August 25, 2015, and waived the fourteen-day stay of enforcement in Federal Rule of Bankruptcy Procedure 4001(a)(3) for cause. Dckt. 107.

ORDER FOR FURTHER HEARING AFTER REMAND

Pursuant to the Bankruptcy Appellate Panel's ("BAP") remand of December 2, 2016, the court issued an order on February 14, 2017, setting this matter for further hearing. Dckt. 148. The court listed

three issues identified by the BAP. First, the court addressed the issue of asserted "multiple transfers of property" by stating that it was a typographical error that the court will correct in its decision because no such transfers occurred and that the court's original ruling was not based on the errant fact.

Second, the court addressed the issue of denying Debtor's request to present evidence at the time of the hearing of notice of the bankruptcy having been provided to Movant. The court noted that it would consider granting leave from the Local Bankruptcy Rules for good cause shown if Debtor (*pro se*) presented cause that was beyond merely stating that he is trying to represent himself.

Third, the court discussed the BAP's direction to consider the unreported BAP decision in *Ellis v. Yu (In re Ellis)*. The court distinguished *In re Ellis* from the instant case because that case was filed after a foreclosure sale had been conducted on the debtor's property, but in the instant case, no foreclosure sale had occurred when the bankruptcy case was filed. The court's record show that this bankruptcy case was filed at 4:04 p.m. on August 25, 2015.

The court directed the parties to address whether the BAP's interpretation of 11 U.S.C. § 362(d)(4) discussed in *In re Ellis* applies to the instant Motion, whether Nationstar Mortgage, LLC is a person who may seek relief under 11 U.S.C. § 362(d)(4), and whether Movant is a "creditor" as stated in 11 U.S.C. § 362(d)(4).

The court set the further hearing for 2:00 p.m. on March 29, 2017, ordered Movant to file and serve supplemental pleadings on or before February 28, 2017, ordered Debtor to file supplemental pleadings by March 14, 2017, and ordered that any replies be filed by March 21, 2017. Debtor also testifies that he gave telephonic notice after the filing to Movant's "foreclosure department." Declaration, Dckt. 92.

In his Declaration, Debtor states that even though there is no equity in the real property securing Movant's claim, Debtor is eligible for a Keep Your Home California Grant for up to $100,000.00 and for "HAMP," being at that time under "review for a final loan modification." *Id*. Debtor's Declaration concludes with a discussion of various claims he believes he may have under the California Home Owners Bill of Rights.

Most of the documents attached to Debtor's Declaration are illegible, in the thirty-six pages of exhibits none appear to be the notice said to have been faxed after the August 25, 2015 filing of this bankruptcy case.

DEBTOR'S SUPPLEMENTAL STATEMENT

Though having litigated this matter through the Bankruptcy Appellate Panel and this court identifying a point of confusion as to the date of filing of this case and the foreclosure sale (which issue is in addition to the confusion perceived by the BAP Panel), Debtor has elected to not provide any additional information to the court.

MOVANT'S SUPPLEMENTAL STATEMENT

Movant filed a Supplemental Statement on February 28, 2017. Dckt. 150. Movant agrees with the court's analysis of the first issue about "multiple transfers" and does not address the issue further. Movant does not with to supplement the record regarding the second issue of denying Debtor's request to present evidence of notice.

Finally, Movant agrees with the court's distinction of *In re Ellis* regarding the third issue of whether relief under 11 U.S.C. 362(d)(4) is appropriate and states clearly that in this case, Movant did not hold title to Debtor's property when the bankruptcy case was filed. Title was held by Debtor until Movant conducted foreclosure the day after Debtor filed this case. Therefore, the property was part of Debtor's estate upon filing, and Movant was a creditor with a claim secured by an interest in the property. Movant argues that *In re Ellis* does not apply to the facts of this case, meaning that Movant's requests for both annulment of the stay and relief under 11 U.S.C. § 362(d)(4) were appropriate.

DISCUSSION

As the court addressed in its Order for Further Hearing After Remand, the reference to "multiple transfers" of the case was an error that will be corrected in the court's decision and had no bearing on the original decision on this Motion.

Regarding the second issue by which the court would allow Debtor to argue good cause, the court notes that Debtor has chosen not to present any argument or evidence of good cause. The notice issue has essentially been abandoned by Debtor.

Finally, Movant has argued—like the court noted—that *In re Ellis* is inapplicable to the current situation because the foreclosure sales occurred at different times. The difference in this case (that the foreclosure sale occurred after the bankruptcy case was filed) means that the property was property of the estate when Debtor filed this case, and which also means consequently that Movant was a creditor. Therefore, Movant properly moved for relief from the stay under 11 U.S.C. § 362(d)(4) and for annulment of the stay.

Ruling on Motion for Relief From Stay

In the Motion Movant conflates the requirements for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) or (2) with the relief pursuant to 11 U.S.C. § 362(d)(4). In the Motion, Movant does not clearly identify the statutory grounds for the requested relief of annulling the stay. Even in the Points and Authorities Movant merely refers to it as requesting relief pursuant to "11 U.S.C. § 362(d)." Such relief could be for cause, lack of equity and not necessary for an effective reorganization, or as part of a scheme to hinder, delay, or defraud creditor(s). This latter basis, 11 U.S.C. § 362(d)(4) allows for the granting of relief from the stay, and then for that order to be effective in subsequently filed bankruptcy cases. In essence, 11 U.S.C. § 362(d)(4) is "for cause" relief available under 11 U.S.C. § 362(d)(1) on steroids, its powers carrying it into subsequently filed cases by the same debtor or involving the property that is the subject of the Motion.

The court treats the relief from stay request as being "for cause," 11 U.S.C. § 362(d)(1) that and such relief is sought pursuant to 11 U.S.C. § 362(d)(4) to obtain the future effectiveness of the order.

11 U.S.C. § 362(d)(4) Relief

11 U.S.C. § 362(d)(4) allows the court to grant relief from stay where the court finds that the petition was filed as part of a scheme to delay, hinder or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of secured creditors or court approval or (ii) multiple bankruptcy cases affecting the property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

This is Debtor's fourth bankruptcy since 2014 (and Debtor's fifth since 2011. The following charts provides the four most recent cases:

Case Number	Date Filed	Date Discharged	Date Dismissed	Reason for Dismissal
14-23403-Chapter 13	April 2, 2014		May 1, 2014	Failure to timely file documents. Dckt. 27.
14-25966 - Chapter 7	June 4, 2014	October 24, 2015		
14-31766	December 2, 2014		June 29, 2015	Delinquency and delay in filing plan. Dckt. 44.
15-26710	August 25, 2015			

On September 28, 2015, the court issued an order denying the Debtor's Motion to Extend Automatic Stay. Dckt. 39. The court specifically stated:

> The court has previously addressed the filing of the current case, the dismissal and vacating of the dismissal, and denial without prejudice of a prior motion to extend the automatic stay. Order Denying Motion to Extend Stay, Dckt. 11; Memorandum Opinion and Decision, Dckt. 12; and Order Vacating Dismissal of Case, Dckt. 29. This bankruptcy case was filed on August 25, 2015. The current Motion to Extend the Automatic Stay was filed on September 24, 2015. This was the thirtieth day after the commencement of the bankruptcy case.
>
> To extend the automatic stay as provided in 11 U.S.C. § 362(c)(3)(B), the order must be entered within thirty days of the commencement of the case. That is an impossibility in this case. As previously noted by the court, 11 U.S.C. § 362(c)(3)(A) provides that on the thirtieth day after the commencement of a bankruptcy case within one year of a prior case being dismissed, the automatic stay will terminate by operation of law in the second case, as to the debtor. This is contrasted to the language used by Congress in 11 U.S.C. § 362(c)(4) which provides

that the automatic stay (without qualification as to the "debtor" or the "estate") will not go into effect as provided in that section.

Additionally, while Debtor believes that he has submitted evidence to rebut the presumption of bad faith arising under 11 U.S.C. § 362(c)(3) (A), such does not appear to be the case. The "evidence" consists of nothing more than the Debtor's declaration which states,

"I have made all efforts to address all courts' points in the rebuttal of bad faith."

Declaration, Dckt. 34. This is nothing more than the Debtor stating his personal conclusions of law, and does not provide the court with evidence to make necessary findings of fact and conclusions of law concerning whether Debtor is in fact acting in good faith.

> Therefore, upon review of the Motion, Debtor's Declaration, the files in this case, and good cause appearing;
>
> **IT IS ORDERED** that the Debtor's Motion to Extend the Automatic Stay, which for the specified acts "shall terminate with respect to the debtor" by operation of law pursuant to 11 U.S.C. § 362(c)(3)(A) on the thirtieth day after the commencement of this case, pursuant to 11 U.S.C. § 362(c)(3)(B) is denied.

Id.

While the Debtor argues that there is not sufficient evidence to show that there is cause to grant relief retroactively and under § 362(d)(4), there appears to be efforts by Debtor to delay the Movant from enforcing their rights. As mentioned before by the court, it is not surprising when a debtor files on the eve of a foreclosure sale to stop the sale. However, Debtor has not only filed the instant case, it appears that the Debtor has attempted to "hide" the previous cases from the court. On August 25, 2015, along with the petition, Debtor filed a Statement of Social Security Number, indicating that Debtor has a Social Security number. Dckt. 5. That Social Security number matches those that Debtor used in previous cases. As such, Debtor admits to having a Social Security number.

However, on November 23, 2015, Debtor filed an Amended Statement of Social Security number. Dckt. 72. In this amendment, Debtor now indicates that he does not have a Social Security number, and instead has only a tax payer identification number. No information is provided how Debtor has apparently "lost" his Social Security number.

It appears to the court that this amendment was part of a scheme to "hide" Debtor's prior cases and to avoid the court from issuing any orders due to Debtor's repeated filings. Such tactics are not only impermissible but also raise serious concerns about the veracity of Debtor's filings.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 364(d)(4). Movant has provided sufficient evidence concerning a series of bankruptcy cases being filed with respect to the subject property. The unauthorized transfers of interests in the subject property to beneficiaries who then filed several bankruptcies were a deliberate attempt as a stay to any foreclosure. The court finds that the filing of the present petition works as part of a scheme to delay, hinder, or defraud Movant with respect to the Property by both the transfer of an interest in the property and the filing of multiple bankruptcy cases.

The court shall issue a minute order terminating and vacating the automatic stay to allow Nationstar Mortgage LLC, 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. The court also grants relief pursuant to 11 U.S.C. § 362(d)(4).

Cause for Annulling the Automatic Stay

This "scheme" for the granting of 11 U.S.C. § 362(d)(4) relief is also a basis for showing cause to annul the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (4). The bankruptcy court examines the circumstances of the specific case and balance the equities of the parties' respective positions. *See Nat'l Envtl. Waste Corp.*, 129 F.3d at 1055; *Fjeldsted v. Lien* (*In re Fjeldsted*), 293 B.R. 12, 24 (9th Cir. BAP 2003). In balancing the equities, the court may consider a number of different factors. *In re Fjeldsted*, 293 B.R. at 24–25. The following list is of factors to assess the equities:

1. Number of filings;

2. Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors;

3. A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser;

4. The Debtor's overall good faith (totality of circumstances test);

5. Whether creditors knew of stay but nonetheless took action, thus compounding the problem;

6. Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules;

7. The relative ease of restoring parties to the status quo ante;

8. The costs of annulment to debtors and creditors;

9. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct;

10. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;

11. Whether annulment of the stay will cause irreparable injury to the debtor;

12. Whether stay relief will promote judicial economy or other efficiencies.

Id. at 25 (citations omitted).

In the instant case, and upon reviewing the factors, annulling the stay retroactively is appropriate given the totality of the circumstances. As discussed supra, the repeated filings of Debtor are transparently purposeful in prejudicing Movant. Debtor relies on an alleged communications to Movant on the eve of the scheduled foreclosure sale. However, there is no evidence provided to substantiate these claims. Though litigating the court's prior order granting the relief from stay through an appeal to the Bankruptcy Appellate Panel (which remanded the matter to this court) Debtor has not filed any additional documents for this Contested Matter to advance his case. This failure to act, after prosecuting three prior bankruptcy cases and an appeal leaves this trial court *perplexed*. If Debtor, in good faith, believed that he had such a meritorious argument, having successfully navigated the complexities of a federal court appeal, he should be reasonably expected to provide evidence in support of such good faith belief to this court.

Debtor has been in four bankruptcies in the past year. The numerous attempts of Debtor to prevent Movant from exercising its rights are evidence of such. Debtor delaying the implementation of this court's order for now more than a year, without coming in to do anything to defend his position after appeal speaks volumes as to Debtor's true motivation. As with the prior three bankruptcy cases not prosecuted, it is delay for delay's sake.

The administrative factors outlined above all weigh in favor of annulling the stay. This is due to the sale already having taken place and unwinding the sale, in light of the instant case being part of a scheme to prejudice Movant, would cause prejudice to Movant, Debtor, and third parties. Further, not annulling the stay would appear to green light abuses of the Bankruptcy Code in which it is used for no good faith purpose of rehabilitation or fresh start, but merely as a tool of abuse.

Granting of 11 U.S.C. § 362(d)(4) Relief In Addition to Annulling the Automatic Stay

In footnote 7 to the BAP Memorandum, the BAP Panel questioned whether relief pursuant to 11 U.S.C. § 362(d)(4) was appropriate if the court also annulled the automatic stay. The BAP Panel directed the court to the discussion in the unpublished decision, *Ellis v. Yu (In re Ellis)*, 523 B.R. 673, 679–80 (B.A.P. 9th Cir. 2014). The question posed is whether Movant, if the automatic stay is annulled, is a "creditor" when the motion is filed and relief sought (before the order annulling the stay is effective) who may seek such relief from the court.

In *Ellis*, that BAP panel was presented with a fact pattern in which the foreclosure sale occurred on June 11, 2013, and Yu purchased the property from the successful bidder at the foreclosure sale on

October 15, 2013, with the deed recorded on October 28, 2013. Ellis, the debtor whose property was the subject of the June 11, 2013 foreclosure sale, did not file bankruptcy until December 9, 2013—six months after the foreclosure sale was conducted. *Ellis v. Yu*, 523 B.R. 674.

Yu, the purchaser from the successful bidder at the June 11, 2013 foreclosure sale, filed a motion for relief from the stay, including prospective relief pursuant to 11 U.S.C. § 362(d)(4). While an unpublished decision does not present controlling law (to the extent that a Bankruptcy Appellate Panel decision can be more than persuasive authority for district court and bankruptcy court judges), that panel's decision is relevant in considering the plain meaning of the language used by Congress in 11 U.S.C. § 362(d)(4). At issue was whether a person who was not a creditor of the debtor with a secured claim in real property of the debtor could seek prospective relief pursuant to 11 U.S.C. § 362(d)(4).

The *Ellis* panel's consideration starts with the plain language of 11 U.S.C. § 362(d)(4), which in pertinent part provides:

> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either– . . . .

A condition of the court granting relief pursuant to 11 U.S.C. § 362(d)(4) is that the stay must relate to the claim of a creditor secured by an interest in real property of the debtor or bankruptcy estate. The *Ellis* panel concluded that Yu (who was seeking the relief) did not assert to be a creditor of Ellis, and therefore could not seek relief pursuant to 11 U.S.C. § 362(d)(4).

Congress has established the following defined terms under the Bankruptcy Code for proceedings thereunder:

§ 101. Definitions

In this title the following definitions shall apply:

. . .

(5) The term "claim" means–

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

. . .

(10) The term "creditor" means--

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(I) of this title; or

(C) entity that has a community claim.

(12) The term "debt" means liability on a claim.

(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

11 U.S.C. § 101(5), (10), (11), and (12).

In considering the situation now before the court, at the time of the August 25, 2015 bankruptcy filing no foreclosure sale had occurred. Movant asserts in the Motion that it is a creditor with a secured claim as of the August 25, 2015 filing of this bankruptcy case. Motion, p. 2:5.5-8.5; Dckt. 79. There is no contention that the August 26, 2015 foreclosure sale did not occur until after the automatic stay went into effect. As is well-established law in the Ninth Circuit, an act taken in violation of the automatic stay is void. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001); *Schwartz v. United States of America (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992). Only after the stay is annulled, and that order is effective and final, would a void act be made "unvoid."

Applying the statutory definitions of 11 U.S.C. § 101 to the Nationstar Mortgage, LLC - Robert Ramirez relationship as of the August 25, 2015 filing of the bankruptcy case by Robert Ramirez:

A. Nationstar Mortgage, LLC asserts that Robert Ramirez ("debtor," 11 U.S.C. § 101(13));

B. Owed a monetary obligation ("debt," 11 U.S.C. § 101(5)) to Nationstar Mortgage, LLC (a "claim" 11 U.S.C. § 101(5));

C. Which claim was owning Nationwide, LLC as of the filing of the bankruptcy case ("creditor," 11 U.S.C. § 101(10)) on August 25, 2015;

D. Which Claim held by Movant is secured by the real property owned by Debtor as of the August 25, 2015 filing of the bankruptcy case; and

E. The non-judicial foreclosure sale did not occur until August 26, 2015, after the bankruptcy case was commenced.

As of the August 25, 2015 commencement of the bankruptcy case, as of the filing of the motion to annul the stay and for § 362(d)(4) relief, as of the hearing on the motion, and at the time the court decided the

Motion, Movant is a "creditor whose claim is secured by an interest in such real property [of the debtor or estate that is subject to the automatic stay]. . . ." 11 U.S.C. § 362(d)(4).

The 11 U.S.C. § 362(d)(4) provides a statutory basis for "in rem" relief that many court's sought to grant in orders on motion for relief from the automatic stay, without the required adversary proceeding for such injunctive relief. Fed. R. Bankr. P. 7001. With the 2005 amendments to the Bankruptcy Code, Congress created the *in rem* § 362(d)(4) relief. As originally enacted, the statute required that there be the conjunctive determination and the debtor had a scheme to hinder, delay, and defraud for relief to be granted under § 362(d)(4). In light of some courts taking a very narrow construction of the statute, Congress amended 11 U.S.C. § 362(d)(4) to require only that there be a scheme which, in the disjunctive, was at least to hinder, delay, or defraud the creditor(s).

While the holding in the unpublished *Ellis v. Yu (In re Ellis)*, is true to the plain language of the statute, requiring someone seeking such relief to be a "creditor" when seeking the relief, the plain reading of the statute applies here as well. As discussed above, Movant is a creditor to this day (not having a final order annulling the automatic stay), was a creditor when filing the Motion now before the court, and a creditor when Debtor filed this bankruptcy case. While Congress had distinguished between a creditor who forecloses before the bankruptcy case being filed, and thereby not a creditor in the bankruptcy case, Congress has not created a sub-class of creditors for 11 U.S.C. § 362(d)(4) – limiting the rights of one group of creditors who seek to annul the stay to make a post-petition foreclosure valid and a creditor who merely obtains relief from the stay to conduct the post-petition foreclosure sale. Applying the plain language of 11 U.S.C. § 362(d)(4) and the statutory definition of a creditor does not leave a basis for the court to create such a distinction and judicially trim the rights granted by Congress. FN. 1.

FN.1. The Supreme Court has been very clear in reading and applying the "plain language" stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)); *United Savings Association of Texas v. Timbers of Inwood Forest Associates, LTD.*, 484 U.S. 365, 371 (1988).

Movant has standing to request the 11 U.S.C. § 362(d)(4) relief.

The moving party has alleged adequate facts and presented sufficient evidence to support the court waving the fourteen-day stay of enforcement required under Rule 4001(a)(3).

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 the creditor 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 effective to August 25, 2015, the commencement of this bankruptcy case, to allow Nationstar Mortgage LLC, 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 which 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 purchaser at any such sale obtain possession of the real property commonly known as 2440 Beaufort Drive, Fairfield, California.

IT IS FURTHER ORDERED that relief is granted pursuant to 11 U.S.C. § 362(d)(4) with this order granting relief from the stay, if recorded in compliance with applicable State laws governing notices of interests or liens in real property, shall be binding in any other case under this title purporting to affect such real property filed not later than two years after the date of the entry of such order by the court, except as ordered by the court in any subsequent case filed during that period.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

2. **16-26043-E-13 SUSAN GEDNEY** **STATUS CONFERENCE RE: COMPLAINT**
17-2006
GEDNEY V. WRIGHT ET AL **1-30-17 [7]**

Plaintiff's Atty: Aubrey L. Jacobsen
Defendant's Atty: unknown

Adv. Filed: 1/24/17
Answer: none

Amd. Cmplt Filed: 1/30/17
Answer: none

Nature of Action:
Declaratory judgment
Validity, priority or extent of lien or other interest in property

Notes:
[TAG-2] Application for Preliminary Injunction filed 2/22/17 [Dckt 10]; Order denying without prejudice filed 3/10/17 [Dckt 31]

Motion to Extend Time [Defendant Sarah M. Wright] filed 2/23/17 [Dckt 15]; Order filed 2/27/17 [Dckt 16]

Request for Entry of Default by Plaintiff [Gabriel Witkin] filed 3/13/17 [Dckt 34]; Entry of Default and Order Re: Default Judgment Procedures filed 3/16/17 [Dckt 40]

Request for Entry of Default by Plaintiff [Tenth Hall, Inc.] filed 3/13/17 [Dckt 36]; Entry of Default and Order Re: Default Judgment Procedures filed 3/16/17 [Dckt 38]

Plaintiff's Discovery Plan filed 3/22/17 [Dckt 44]

Plaintiff's Initial Disclosures filed 3/22/17 [Dckt 46]

The Status Conference is continued to 2:00 p.m. on xxxxxxxxx, 2017.

SUMMARY OF COMPLAINT

Susan Gedney ("Plaintiff-Debtor") seeks in the First Cause of Action a determination that a pre-petition listing agreement does not constitute authorization to be employed post-petition pursuant to 11 U.S.C. § 327. In the Second Cause of Action, Plaintiff-Debtor seeks a determination that Defendants are not entitled to compensation pursuant to 11 U.S.C. § 330.

The Third-Cause of Action asserts claims for breach of duty by Defendants in acting as the real estate broker for Plaintiff-Debtor.

In the Fourth-Cause of Action Plaintiff-Debtor seeks a determination that Defendants are not entitled to compensation pursuant to 11 U.S.C. § 328.

In the Fifth Cause of Action Plaintiff-Debtor asserts that Defendants contending that they had enforceable rights and claiming an interest in proceeds from a post-petition sale of property of the estate constitutes a violation of the automatic stay.

In the Sixth Cause of Action, Plaintiff-Debtor cites to 11 U.S.C. § 365 and the rejection of the pre-petition listing agreement upon the future confirmation of the Plaintiff-Debtor's Chapter 13 Plan.

In the Seventh Cause of Action, Plaintiff-Debtor requests contractual and statutory attorneys' fees.

It appears that, other than the Fifth Cause of Action, all of the other claims and rights are properly asserted in contested matter motion practice. It does not appear that the asserted rejection of an executory contract, denial of fees, or violation of the automatic stay are tied to any alleged breach of duties under the listing agreement.

SUMMARY OF ANSWER

No answers have been filed by any of the Defendants. At the preliminary injunction hearing on March 9, Gabriel Witkin and Sarah Wright, Defendants, appeared and stated that they would not be contesting termination of the executory contract listing agreement. Mr. Witkin stated that his reluctance in cooperating with Plaintiff-Debtor and Plaintiff-Debtor's counsel was not because he wanted any money, but was concerned that the broker that Plaintiff-Debtor sought to use post-petition was not as experiences as Mr. Witkin and could not provide the same level of service in conducting a short-sale of property.

PROCEEDINGS IN PLAINTIFF-DEBTOR'S BANKRUPTCY CASE

Though the court issued an order shortening time so Plaintiff-Debtor could promptly obtain an order rejecting the pre-petition listing agreement as an executory contract (which Mr. Witkin indicated that he would not oppose), the court does not see such motion having been filed by Plaintiff-Debtor in the bankruptcy case. Bankr. E.D. Cal. 16-26043.

ENTRY OF DEFAULTS

The court notes that the defaults of the following Defendants have been entered:

A. Tenth Hall, Inc. Entry of Default filed March 16, 2016; Dckt. 38.

B. Gabriel Witkin Entry of Default filed March 16, 2016; Dckt. 40.

For each of the above, Plaintiff-Debtor has thirty days from March 15, 2016 to file and serve a noticed motion (supported by sufficient equity and legal authorities) for the default judgment relief requested.

No request has been made for the entry of the default of the third Defendant, Sarah Wright. In Plaintiff-Debtor's Discovery Plan (Dckt. 44), Plaintiff-Debtor explains as to this third Defendant:

> "Entries of Default have recently been entered against Defendants GABRIEL WITKIN and TENTH HALL, INC., with Applications for Entries of Default Judgments to be submitted shortly. Default was not entered against Defendant SARAH M. WRIGHT because of an Application to Extend Time filed by that Defendant, which the Court considers a responsive document sufficient to bar a Clerk's Entry of Default."

Dckt. 44; p. 2:17.5–22.5.

The requests for entry of the Gabriel Witkin and Tenth Hall, Inc. Defendants were filed on March 13, 2017. Dckts. 34, 36. Contrary to concluding that the Application constituted a responsive pleading to the Complaint, the court ordered:

> "**THEREFORE**, upon review of the ex parte request filed by Defendant Sarah M. Wright and the files in this Adversary Proceeding, and good cause appearing;
>
> **IT IS ORDERED** that Sarah M. Wright, Gabriel Witkin, and Tenth Hall, Inc., may present opposition to the Motion for Preliminary Injunction at the March 9, 2017 hearing, as well as written opposition filed in advance. Such party must be represented by counsel, if not permitted to appear in pro se.
>
> **IT IS FURTHER ORDERED** that any party asserting an opposition must appear in person at the hearing, either individually or by the licensed attorney representing them at the March 9, 2017 hearing on the Motion for Preliminary Injunction."

Order, Dckt. 16. The order includes an analysis of the request by Ms. Wright, concluding that it is for additional time to respond to the motion for preliminary injunction. *Id*. No other relief was granted, and the court did not treat the Application as a "responsive pleading" to the Complaint. The court's order was filed on February 27, 2017.

On March 3, 2017, Plaintiff-Debtor filed requests for entry of defaults against Defendants Sarah Wright, Gabriel Witkin, and Tenth Hall, Inc. Dckts. 19, 21, 23. The Court, through the Clerk's Office, responded to each of the three requests, stating the following deficiencies:

A. No Request for Entry of Default by Plaintiffs, form EDC 3-726, was submitted.

B. No Entry of Default and Order Re: Default Judgment Procedures, form EDC 3-727, was submitted.

C. The declaration/affidavit does not set forth the following required facts:

1. A statement that the court has fixed a deadline for the filing of the answer or motion, or that the 30 or 35 day time limit applies;

2. The date the complaint was served on the defendant, or the date of service of the complaint on the defendant stated in the declaration/affidavit is incorrect;

3. A statement that the defendant is not entitled to the benefits of the Servicemembers Civil Relief Act of 2003 (50 U.S.C. Appendix 501 et seq.);

4. A statement that the defendant is not an infant or incompetent person.

5. Answer or Motion was filed on 2/23/2017 [as to Sarah Wright] and the matter must now be set for a hearing before the judge.

Memorandum re Default Papers, Dckts. 25, 26, 27.

Plaintiff-Debtor is correct saying that a motion was filed on February 23, 2017, and the Clerk of the Court stated in the March 9, 2017 Memorandum that the motion was one of the multiple reasons for not entering the default against Sarah Wright at that time, but Plaintiff-Debtor ignores that the court ruled on the Motion and there actually was nothing before the court as of March 13, 2017, when Plaintiff-Debtor requested entry of the defaults of the other two Defendants.

REQUIRED PLEADING OF CORE AND NON-CORE MATTERS, CONSENT OR NON-CONSENT TO NON-CORE MATTER

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint "[m]ust contain: (1) a short and plain statement of the grounds for the court's jurisdiction...," apply to complaints in Adversary Proceedings. In add to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds the addition pleading requirement concerning whether the matters in the complaint are core or non-core:

> "Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, **the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge**."

Fed. R. Bankr. P. 7008 (emphasis added).

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) applies in adversary proceeding. Fed. R. Bankr. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matter are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

> "(b) Applicability of Rule 12(b)-(I) F.R.Civ.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary proceedings. A responsive pleading **shall admit or deny an allegation that the proceeding is core or non-core**. If the response is that the proceeding is **non-core, it shall include a statement that the party does or does not consent** to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."

Fed. R. Bank. P. 7012(b) (emphasis added).

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff does not allege in the Complaint the basis for federal court jurisdiction for this Adversary Proceeding. Plaintiff-Debtor does allege that this is a core proceeding 28 U.S.C. §157(b)(2)(N), "orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate." The Complaint does not allege any orders approving the sale of property or any claims arising from such order.

FURTHER STATUS CONFERENCE

It appears that there is no opposition to the Complaint and whatever relief may properly be entered in an adversary proceeding. However, it also appears that Plaintiff-Debtor is failing to take the necessary steps in her bankruptcy case to address the issues at the core of this Adversary Proceeding: (1) rejecting the pre-petition listing agreement, (2) obtain an order authorizing the employment of a real estate broker, (3) marketing the real property for sale, and (4) seeking relief from asserted violations of the automatic stay in the bankruptcy case and not by adversary proceeding.

3. **09-29681-E-13 FERNANDO/ALAPE GELVERIO** **CONTINUED STATUS CONFERENCE**
16-2217 **COMPLAINT**
GELVERIO ET AL V. U.S. BANK **10-7-16 [1]**
CONSUMER FINANCE ET AL

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: unknown

Adv. Filed: 10/7/16
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g., other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 1/18/17

Plaintiffs' Initial Disclosures filed 1/25/17 [Dckt 10 at page 3]

Plaintiffs' 2nd Status Report filed 3/22/17 [Dckt 12]

The Status Conference is continued to 2:00 p.m. on xxxxxxxxxx, 2017.

MARCH 29, 2017 STATUS CONFERENCE

In Plaintiff-Debtor's 2nd Status Report filed on March 22, 2017, it is stated that no response or communication has been received from defendant U.S. Bank Consumer Finance. No information is provided as to what Plaintiff-Debtor has done to actively prosecute this Adversary Proceeding.

At the Status Conference Plaintiff-Debtor reported xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Summary of Complaint

The basic allegations of the Complaint are that: (1) Defendant had a claim secured by a junior deed of trust in Plaintiff-Debtors Chapter 13 bankruptcy case; (2) a motion to value Defendants secured claim was granted (though it does not alleged that it was valued at $0.00); (3) Plaintiff-Debtors Chapter 13 Plan provides that the lien of Defendant shall be void and stripped upon completion of the [Chapter 13] case; (4) the Chapter 13 Plan has been completed; and

(5) Defendant (named First Financial Services, LLC dba The Lending Center aka U.S. Bank Consumer Finance) has not reconveyed the deed of trust which is now void.

Defendants In the Complaint

In the Caption of the Complaint two defendants are named: (1) U.S. Bank Consumer Finance and (2) First NLC Financial Services DBA The Lending Center. The Certificate of Service does not indicate that First NLC Financial Services has been served with the Complaint. Dckt. 6.

In Plaintiff-Debtor's Chapter 13 Bankruptcy Case Proof of Claim No. 14 was filed for an entity identified as U.S. Bank Consumer Finance. The address for this entity is listed as being in Cincinnati, Ohio. The Proof of Claim also indicates that this entity was formerly known as First Finance and Star Bank Finance.

The Deed of Trust attached to Proof of Claim No. 14 identifies First NLC Financial Service, LLC, DBA The Lending Center as the lender and beneficiary. Proof of Claim 14, p. 3.

The California Secretary of State does not list any entity known as U.S. Bank Consumer Finance as being registered to do business in California. https://businesssearch.sos.ca.gov. For First NLC Financial Services, LLC, its status is listed as FTB FORFEITED. *Id.*

Stated Causes of Action

The First Cause of Action seeks Declaratory Relief. It appears that this may actually be a claim for quiet title and a determination that the deed of trust is void and does not encumber the property.

The Second Cause of Action is titled as one for Extinguishment of the Second Deed of Trust Claim. This Cause of Action appears to assert that the deed of trust is not void, but in full force and effect. It requests that the court then extinguish the not void deed of trust.

The Third Cause of Action asserts that Defendant failed to reconvey the deed of trust once no obligation existed for it to secure, and based thereon Plaintiff-Debtor has a statutory damages claim arising under California Civil Code § 2941(d). The statutory damages claim is stated in the amount of $500 and all attorneys fees and costs, as allowed for in the contract between the parties.

A Fourth Cause of Action for Breach of Contract is asserted based on the failure to reconvey the deed of trust.

A Fifth (intentional) and Sixth (negligent) Causes of Action is asserted for violation of the Federal Fair Credit Reporting Action, citing 15 U.S.C. § 1681w. That specific code section relates to the Federal Trade Commission and several other entities issuing regulations relating to the disposal of consumer records. This Cause of Action then states that defendant(s) deliberately and/or recklessly did not maintain reasonable procedures to protect against reporting erroneous personal financial information in violation of 15 U.S.C. § 1681. Nothing other than that legal conclusion is stated in this Cause of Action.

The Seventh Cause of Action states that Defendant is liable for negligence per se for reporting (unidentified) financial information in violation of 15 U.S.C. § 1681. Nothing other than that legal conclusion is stated in this Cause of Action.

Plaintiff-Debtor requests attorneys' fees and costs based on contract (deed of trust) and statutory (Cal. Civ. § 2941).

In the Prayer of the Complaint, the specific relief requested is:

A. The court issue a judgment that the deed of trust is an unsecured lien and that the lien should be treated as an
unsecured claim.

B. The court issue a judgment voiding the second deed of trust.

C. Award of attorneys fees based on contract and statute.

D. $500.00 Civil Penalty.

E. For further relief.

No relief is requested for the various Fair Credit Reporting Act and Gramm-Leach-Bliley legal conclusion stated in the Complaint.