

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher M. Klein
Bankruptcy Judge
Sacramento, California

April 16, 2019 at 1:30 p.m.

1. [18-23571](#)-C-13 TIMOTHY JANOVICH CONTINUED MOTION FOR RELIEF
[EAT-1](#) Eric Schwab FROM AUTOMATIC STAY
11-5-18 [[39](#)]
WELLS FARGO BANK, N.A. VS.

No 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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 5, 2018. 28 days' notice is required. That requirement was met.

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 ~~XXXXXX~~.

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to Timothy Patrick Janovich's ("Debtor") real property commonly known as 703 Main Street, Roseville, California ("Property"). Movant has provided the Declaration of Rachel Mdarcella Cathcart Love to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Rachel Mdarcella Cathcart Love Declaration states that there are four post-petition defaults in the payments on the obligation secured by the Property, with a total of \$5,591.12 in post-petition payments past due. The Declaration also provides evidence that there are no pre-petition payments in

default.

DEBTOR'S OPPOSITION:

Debtor filed an Opposition on November 20, 2018. Dckt. 47. Debtor asserts that he filed this Chapter 13 bankruptcy proceeding to prevent the foreclosure on the subject Property. Debtor asserts that the alleged non-payments were paid through his Chapter 11 bankruptcy; however, the Movant refused tender of the payments from the Chapter 11 administrator. This bankruptcy proceeding was filed as an attempt to pay the alleged arrears to this lender which may have accumulated between the date of confirmation of the Chapter 11 Plan and the date of the filing of this Chapter 13 case. Dckt. 48, Janovich Declaration.

TRUSTEE'S RESPONSE:

The Trustee responds that he does not oppose the Motion. The Trustee flags for the court that the Movant is included in Debtor's proposed Plan as both a Class 2A creditor with regard to the mortgage arrears and as a Class 4 creditor regarding the first mortgage. The Trustee further notes that the Debtor has not filed a Motion to Confirm the Plan and was notified in September that an Amended Plan would be file, but to date has not been filed. Dckt. 45.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$126,934.02 as stated in the Rachel Mdarcella Cathcart Love Declaration and Schedule D. The value of the Property is determined to be \$304,952.00, as stated in Schedules A and D.

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. See *J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. See *In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court requires additional testimony from the parties in order to determine whether cause exists for terminating the automatic stay, as a result of purported defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432. At the December 4, 2018 hearing, the parties agreed to continue the hearing.

The January 29, 2019 hearing was continued due to a calendaring error by Debtor's counsel. The Parties agreed to continue this matter in light of

the prior efforts to resolve the matter, which were not completed due to the calendaring error.

At the March 5, 2019 hearing, it was reported that the payment was received from the Trustee, it was confirmation that the payment applied the post-petition default. The Debtor concurred that the payment applied to the post-petition default. Additionally, Creditor confirmed that there was still \$3,682.24 (two post-petition monthly defaults) in arrears.

The hearing was again continued, at the continued hearing ----.

~~The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.~~

~~No other or additional relief is granted by the court.~~

~~The court shall issue an order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion for Relief from the Automatic Stay filed by Wells Fargo Bank, N.A. ("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 Wells Fargo Bank, N.A., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 703 Main Street, Roseville, California, ("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 to obtain possession of the Property.~~

~~No other or additional relief is granted.~~

2. [16-23877](#)-C-13 PAUL EAGLE
[ASW-1](#) D. Randall Ensminger

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
2-6-19 [[79](#)]

THE BANK OF NEW YORK MELLON
VS.

No 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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2019. 28 days' notice is required. That requirement was met.

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 ~~XXXXX~~.

The Bank of New York Mellon ("Movant") seeks relief from the automatic stay with respect to Paul Egale's ("Debtor") real property commonly known as 4377 Country Run Way, Antelope, California ("Property"). Movant has provided the Declaration of Megan Koontz to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Megan Koontz Declaration states that there are 18 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$18,509.94 in post-petition payments past due. The Declaration also provides evidence that there are no pre-petition payments in default.

CHAPTER 13 TRUSTEE'S RESPONSE:

David Cusick ("the Chapter 13 Trustee") filed a Response on February 22, 2019. Dckt. 85. The Chapter 13 Trustee asserts that the Debtor is current under the confirmed plan where the last posted payment was on January 23, 2019 for \$930.00. Debtor's Plan classified the Movant as a Class 1 creditor regarding the ongoing mortgage payments and arrears as outlined in the "Ensminger provision" included in Section 6 of the Plan and pursuant to the Order Confirming the Plan. Dckts. 5 (Plan); 54 (Order Confirming).

The Movant's claim reflects a secured claim of \$147,300.00 and arrears of \$5,053.07. Claim No. 4-1. The Trustee's records reflect that a total of \$19,308.35 adequate protection payments have been disbursed with a current principal due of \$0.00.

The Trustee also notes that the confirmed Plan provided that the Debtor has "in process a HAMP application" and no evidence has been filed as to any pending application. Movant's motion includes exhibits showing that there was a loan modification prior to filing which the Trustee construes as an implicit denial of any pending application. As such the Trustee contends that the Debtor has 14 days from the motion to file a motion to modify the Plan.

DEBTOR'S OPPOSITION:

Debtor Opposes Movant's request for relief from stay. Debtor's counsel asserts that Debtor applied for a loan modification and received correspondence on January 26, 2019 stating that the application was received. Dckt. 88. Debtor's counsel states that loan modification is still being processed by Movant.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$223,719.89 (including \$147,194.89 secured by Movant's first deed of trust), as stated in the Megan Koontz Declaration and Schedule D. The value of the Property is determined to be \$270,000.00, as stated in Schedules A and D.

The Chapter 13 Plan incorrectly includes Creditor's claim as a Class 1 Claim. Dckt. 5. The Plan does not provide for making the current monthly payment and a payment sufficient to cure the arrearage during the life of the Plan. Rather, the only treatment for Creditor's claim is to make monthly adequate protection payments pending diligent prosecution of a loan modification request, and preserving Creditor's right to seek relief from the automatic stay. See Plan, Section 6, Additional Provisions. Dckt. 5. Creditor has exercised its rights to seek relief from the automatic stay.

This case was filed on June 15, 2016. Debtor's plan filed on June 15, 2016, provides that Debtor will make an adequate protection payment of \$772.85 pending Debtor's diligent prosecution of a HAMP application for a loan modification. The Plan provision makes the affirmative representation that the loan modification is already in process as of June 15, 2016:

6.01.2 Adequate Protection Payment

The Debtor has in process a HAMP Application for modification of this loan. The application requests that the prepetition arrearage, to the extent not waived, be included in a new principal amount to be amortized over the life of the loan as modified. During loan modification application process Bank of America shall be paid an aggregate \$772.85 a month as an adequate protection payment pending determination on the loan modification. The monthly adequate protection payment shall be applied to the post-petition interest on this claim or as specified in a loan modification.

Plan, Additional Provision ¶ 6.01.2. June 15, 2016, is 1,000 days prior to the hearing on this Motion.

In the Opposition, Debtor' counsel argues that Debtor has "applied" for a loan modification on January 22, 2019, which is approximately 935 days after filing the Plan that said Debtor was already in the process of a loan modification. Opposition, Dckt. 88. Debtor provides her testimony in a Declaration that the modification application was completed as of January 22, 2019. Dckt. 89. Debtor provides no testimony of the diligent prosecution of a loan modification application during the 1,000 days since filing this case.

In the Motion, it is alleged that the loan that is the basis of this claim was modified, directing the court to review Exhibit E to determine what and when that was done (Creditor electing to not state such information with particularity in the Motion). Motion ¶ 6, Dckt. 79. The Loan Modification document filed as Exhibit E is dated May 13, 2014 - three years before the filing of the current case.

Here, Debtor has had 1,000 days to diligently prosecute a loan modification. It appears that Debtor has not so prosecuted a loan modification, but has waited two and one-half years to submit a loan application. The submission of the loan modification application coincides with Creditor, after almost 1,000 days, filing the present Motion.

Debtor explains the lack of there being a loan modification being prosecuted before January 2019 as one in which counsel confused the loan modification activities with Movant, who he asserts have been prosecuted, and Bank of America, N.A., which was submitted only in January 2019.

Movant's counsel believes that there are no loan modification applications pending, such being abandoned by Debtor.

The Parties agreed to a further briefing schedule and final hearing. Movant shall file and serve supplemental pleadings on or before April 3, 2019, and Defendant shall file and serve supplemental pleadings, if any, on or before April 10, 2019. The briefing should address whether relief is warranted rests on whether there is still a pending request for loan modification and, if denied, the Movant provided proper notice to the Debtor and Debtor's counsel regarding its determination.

MOVANT'S SUPPLEMENTAL BRIEFING:

On March 3, 2019, Movant filed a Supplemental Declaration of Megan Koontz and accompanying Exhibits. Dckts. 99; 100. The Koontz Declaration states that there is no open pending loan modification and that the review was closed on October 6, 2017 by customer request. Dckt. 99. The Koontz Declaration further states that the customer request to cancel the loan modification was made by Debtor's Counsel, however, states that the person was named Ana and/or Mr. Murray, neither appear to be Debtor's Counsel.

DEBTOR'S SUPPLEMENTAL OPPOSITION:

Debtor states that Movant attempts to circumvent the requirements set forth in Debtors confirmed Plan which requires Movant to deny Debtor's loan modification request in writing before Debtor can file an Amended Plan. Debtor asserts this has not occurred and thus cannot file an Amended Plan.

Debtor disputes that counsel made a request to withdraw the loan modification and the named provided in Movant's declaration do not coincide with individuals at Debtor's counsel's firm.

Decision:

At the hearing -----.

The court shall **xxxx**.

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 the Bank of New York Mellon ("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 **xxxx**.
