UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher M. Klein
Bankruptcy Judge
Sacramento, California

May 21, 2019 at 1:30 p.m.

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1. **18-27728-C-13** **SCOTT/MELINDA BROWN** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY**
ETW-1 **Gary Fraley** **3-6-19 [55]**

DAVID MEYERS VS.

Thru #2

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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, parties requesting special notice, and Office of the United States Trustee on March 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 denied without prejudice.~~

David C. Meyers ("Movant") seeks relief from the automatic stay with respect to Scott Brown and Melinda Brown's ("Debtors") real property commonly known as 1704 10th Avenue, Olivehurst, California ("Property"). Movant has provided the Declaration of David C. Meyers to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The David C. Meyers Declaration states that there are twp post-petition defaults in the payments on

the obligation secured by the Property, with a total of $1,709.12 in post-petition payments past due. The Declaration also provides evidence that there are seven pre-petition payments in default, with a pre-petition arrearage of $5,981.92. Movant also asserts that the property is not insured.

DEBTORS' OPPOSITION:

Debtors filed an Opposition on March 18, 2019. Dckt. 73. Debtors asserts that they have been current on all proposed Plan payments and have provided proof to the creditor that the property is insured.

CHAPTER 13 TRUSTEE'S RESPONSE:

David Cusick ("the Chapter 13 Trustee") filed a Response on March 19, 2019. Dckt. 75. The Trustee asserts that Debtor has paid to the Trustee a total of $2,311.00 to date. The Trustee has disbursed 2 mortgage payments to Movant totaling $1,709.12 on February 28, 2019.

CHAPTER 13 TRUSTEE'S SUPPLEMENTAL RESPONSE:

On April 16, 2019 the Trustee filed a Supplemental Response stating that Trustee issued a check payable to David C. Meyers in the amount of $657.16 to be paid to the arrears claim. Dckt. 100.

DEBTORS' SUPPLEMENTAL DECLARATION:

On April 16, 2019, Debtors filed a supplemental Declaration to address several concerns raised at the April 2, 2019 hearing. Debtors assert that the cars parked in the font yard of the house have been removed, that the Creditor would be included as the "Loss Payee" on the rental insurance policy, that their Plan Payments remain current, and they are addressing any discrepancies related to property taxes.

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 $144,314.00 (as secured by Movant's first deed of trust), as stated in Movant's Declaration and Schedule D. The value of the Property is determined to be $167,100.00, as stated in Schedules A and D.

The court notes that it denied Movant's prior request for relief from stay (Dckt. 52) because there was only one post-petition payment in default and the Debtors had an equity cushion in the property. Since the court entered its Order, Movant claims that Debtors have continued to not make post-petition payments and have not put forth a confirmable Plan. The Trustee's response states that Debtors have been making payments to the Trustee and the Trustee has disbursed payments to the creditor. The court also notes that Debtors proposed an Amended Plan on March 27, 2019 with a confirmation hearing set for May 5, 2019 . Dckt. 85.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movant's claim provides adequate

protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

Continued Hearing and Order to Show Cause

Debtors' counsel did not appear at the May 7, 2019 hearing. Debtors' declaration was filed in which Debtors state that he heard the insurance agent say that the Creditor, as having a deed of trust recorded against the property, could not be listed as the loss payee. Dckt. 102. Given that creditor's with deeds of trust against property in California are commonly named as loss payee's for their interest in the property securing the obligation, Debtors' recitation of what he says he heard does not sound credible.

Debtors' counsel not being at the hearing, this contention and the lack of credibility perceived by the court could not be addressed.

Rather than granting the motion, terminating the stay, and put the Debtors at risk of losing the property based on the non-credible testimony of what Debtors say they heard, the court continues the hearing.

Counsel's failure to appear has caused Creditor to incur wasted attorney's fees for the non-productive hearing. The court requires Debtors and Debtors' counsel to show cause why the court should not order Debtors' counsel to reimburse Creditor $450.00 for the wasted May 7, 2019 hearing.

DEBTOR'S SUPPLEMENTAL RESPONSE TO ORDER TO SHOW CAUSE:

On May 17, 2019, Debtors' counsel filed a response the court's order to show cause. Dckt. 121. Debtors' counsel states that the Creditor has been added as the loss payee since the last hearing. Counsel states that Creditor called the insurance company and provided the required information to be added as the loss payee. Counsel further states that Debtors' were told that the insurance company was incorrect when Debtors were told Creditor could not be added as the loss payee. The Response is not accompanied by a declaration or any other evidence that could be considered credible admissible evidence.

RULING

Despite the court's specific instruction for Debtors to submit competent and admissible evidence, Debtors' counsel provides hearsay statements to address the Debtors purported claims concerning Creditor not being listed as the loss payee. Instead, counsel for Debtor merely provides arguments as to what was said previously and alleges factual information for which no evidence is provided.

In the belated, unsupported Reply, it appears that Debtor's counsel is bemoaning the fact that so many hearing have been necessary in this case. Some hearing and the issuance of the order to show cause were necessitated by Debtor failing to do as promised and Debtor's counsel failing to appear at hearings.

In a Declaration prepared by Counsel for Debtor, Debtor Scott Brown testified under penalty of perjury:

> "B. Per my conversation with Zanaida Akins of PFC Insurance, Ph. 530-749-2388, Creditor 6 can only be added as "Loss Payee" if we were renting the property instead of purchasing. Additionally, the Court's Civil Minutes (DN 50) reflect an equity cushion that

adequately 8 protects Creditor's interest."

Declaration ¶ 2.B., Dckt. 102. Though counsel prepared the Declaration and Debtor testified under penalty of perjury that it was impossible to have the creditor having the obligation secured by Debtor's residence named as a loss payee, and sought to have the court rely on such testimony, Debtor's counsel now says that because the Creditor had contacted the insurance company, Debtor and Debtor's counsel now have learned that the purported statement that the creditor having a lien on a residence cannot be a loss payee was "incorrect."

This learning, or even investigating, that the purported inability of the Creditor to be a loss payee appears not to even have been undertaken until the Order to Show Cause was issued. While the court can understand a calendaring error, as is professed, the court is at a loss how the Debtor and Debtor's counsel can credibly state under penalty of perjury and argue that in good faith they attempted to have Creditor named as a loss payee before telling the court (under penalty of perjury) that such was impossible.

While hopefully not overly emboldening Creditor, the court has serious doubts about Debtor being able to prosecute this case. Additionally, the court does not intend to have to issue orders to show cause to get counsel engaged in the case. Further, Debtor's credibility has now been significantly impaired, as well as counsel's for generating the testimony under penalty of perjury that was obviously wrong to attorneys and anyone who has every had a home mortgage.

The $450.00 in sanctions is not being considered by "wasting" Creditor's counsel's time because of a calendaring error, but necessitating the waste of time because of Debtor's testimony under penalty of perjury that it was impossible to have Creditor named as a loss payee.

At the hearing **xxxxxxxxxxxxxxxxxxxxxxx**

~~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 David C. Meyers ("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 for Stay Relief is denied without prejudice~~

~~**IT IS FURTHER ORDERED** that Gary Fraley, Esq., counsel for Debtor shall pay, on or before June 1, 2019, Creditor David C. Meyer $450.00 to reimburse him for reasonable attorney's fees for the May 7, 2019 hearing for which Debtor's counsel did not appear.~~

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2. **18-27728-C-13 ETW-1** **SCOTT/MELINDA BROWN** **Gary Fraley** **ORDER TO SHOW CAUSE 5-8-19 [118]**

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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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtors, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on May 11, 2019. The court computes that 10 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to appear at the May 7, 2019 hearing to show cause in writing by May 17, 2019, by way of admissible evidence, why Creditor David C. Meyers whose claim is secured by a deed of trust recorded against the real property commonly known as 1704 10th Avenue, Olivehurst, California cannot be listed as the loss payee for the insurance property for that property. Additionally, the court ordered counsel for Debtors, Gary Fraley, Esq., to show cause why the court should not order him to pay Creditor $450.00 to reimburse him for reasonable attorney's fees due to his failure to appear and failure to provide admissible and credible evidence in support of the assertion that Creditor cannot be listed as the loss payee.

The Order to Show Cause is xxxxx.

On May 17, 2019, Debtors' counsel filed a response the court's order to show cause. Dckt. 121. Debtors' counsel apologizes for no being present at the May 7, 2019 hearing. Counsel for Debtor states that due to the number of hearing set during the May and June months, Counsel was confused about the date this matter was set. Debtors' counsel also states that he was at the court on other matter on May 7, 2019 from 12:30 p.m. to 4:00 p.m. and would have been available to appear.

Debtors' counsel further states that the Creditor has been added as the loss payee since the last hearing. Counsel states that Creditor called the insurance company and provided the required information to be added as the loss payee. Counsel further states that Debtors' were told that the insurance company was incorrect when Debtors were told Creditor could not be added as the loss payee. The Response is not accompanied by a declaration or any other evidence that could be considered credible admissible evidence.

Despite the court's specific instruction for Debtors to submit competent and admissible evidence, Debtors' counsel provides hearsay statements to address the Debtors purported claims concerning Creditor not being listed as the loss payee. Debtors' counsel has not:

(1) sufficiently addressed the reason for the insurance company's purported confusion on whether the Creditor could be listed as a loss payee; or

(2) provided a declaration from any person with first hand knowledge of the alleged conversation summarized in the Response.

Instead, Debtors' counsel provides hearsay statements to address the Debtors purported claims concerning Creditor not being listed as the loss payee. Instead, counsel for Debtor merely provides arguments as to what was said previously and alleges factual information for which no evidence is provided.

In the belated, unsupported Reply, it appears that Debtor's counsel is bemoaning the fact that so many hearing have been necessary in this case. Some hearing and the issuance of the order to show cause were necessitated by Debtor failing to do as promised and Debtor's counsel failing to appear at hearings.

In a Declaration prepared by Counsel for Debtor, Debtor Scott Brown testified under penalty of perjury:

> "B. Per my conversation with Zanaida Akins of PFC Insurance, Ph. 530-749-2388, Creditor 6 can only be added as "Loss Payee" if we were renting the property instead of purchasing. Additionally, the Court's Civil Minutes (DN 50) reflect an equity cushion that adequately 8 protects Creditor's interest."

Declaration ¶ 2.B., Dckt. 102. Though counsel prepared the Declaration and Debtor testified under penalty of perjury that it was impossible to have the creditor having the obligation secured by Debtor's residence named as a loss payee, and sought to have the court rely on such testimony, Debtor's counsel now says that because the Creditor had contacted the insurance company, Debtor and Debtor's counsel now have learned that the purported statement that the creditor having a lien on a residence cannot be a loss payee was "incorrect."

This learning, or even investigating, that the purported inability of the Creditor to be a loss payee appears not to even have been undertaken until the Order to Show Cause was issued. While the court can understand a calendaring error, as is professed, the court is at a loss how the Debtor and Debtor's counsel can credibly state under penalty of perjury and argue that in good faith they attempted to have Creditor named as a loss payee before telling the court (under penalty of perjury) that such was impossible.

While hopefully not overly emboldening Creditor, the court has serious doubts about Debtor being able to prosecute this case. Additionally, the court does not intend to have to issue orders to show cause to get counsel engaged in the case. Further, Debtor's credibility has now been significantly impaired, as well as counsel's for generating the testimony under penalty of perjury that was obviously wrong to attorneys and anyone who has every had a home mortgage.

The $450.00 in sanctions is not being considered by "wasting" Creditor's counsel's time because of a calendaring error, but necessitating the waste of time because of Debtor's testimony under penalty of perjury that it was impossible to have Creditor named as a loss payee.

At the hearing **xxxxxxxxxxxxxxxxxxxxxxxx**

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 Order to Show Cause 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 Order to Show Cause is **xxxx**.

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3. **18-23571-C-13 EAT-1** **TIMOTHY JANOVICH** **Eric Schwab** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 11-5-18 [39]**

WELLS FARGO BANK, N.A. VS.

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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 xxxxx.

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.

At the April 16, 2019 hearing, the hearing was continued to May 21, 2019 to permit the Debtor additional time to file and serve an amended plan, motion to confirm, and supporting documentation by May 17, 2019. If the amended plan, motion, and supporting documentation are timely filed, the hearing will against be continued to the confirmation hearing date. If the documents are not filed the motion will be

granted.

At the hearing -----.

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.~~

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