

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 7, 2016 at 9:30 a.m.

1. [16-22282-E-7](#) GEORGE UPTON
JM-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-29-16 [[30](#)]

CINDY O'LEARY VS.

Final Ruling: No appearance at the June 7, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 29, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Cindy O'Leary ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 5496 Rockwood Circle, Stockton, California (the "Property"). The moving party has provided the Declaration of Cindy O'Leary to introduce evidence as a basis for Movant's contention that George Dallas Upton III ("Debtor") do not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Based on the evidence presented, Debtor would

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be at best tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of San Joaquin. Exhibit B, Dckt. 33.

PRIOR BANKRUPTCY FILINGS BY DEBTOR

A review of the court's files discloses the prior bankruptcy cases filed by Debtor which have been pending and dismissed, and one Chapter 7 case which is still pending, in the one-year period prior to April 12, 2016:

Chapter 7 Case No. 16-21004	Filed.....February 23, 2016 Dismissed.....March 7, 2016
Chapter 7 Case No. 15-26355	Filed.....August 11, 2015 Dismissed.....Pending
Chapter 7 Case No. 15-90083	Filed.....January 30, 2015 Dismissed.....June 10, 2015

Thus, in the one-year period preceding the April 12, 2016 filing of this case, Debtor has had two cases which were pending and dismissed.

Pending Chapter 7 Case

Debtor and Debtor's assets are already the subject to a pending Chapter 7 case. Bankr. E.D. Cal. 15-26355. The court in that case (the Hon. Christopher D. Jaime) denied without prejudice a motion by Debtor to extend the automatic stay in that case. 15-26355, Dckt. 25. That motion was denied without prejudice due to "insufficient and inappropriate service." *Id.* Federal Rule of Bankruptcy Procedure 1015(a) provides that the court may consolidate two different bankruptcy cases pending for the same debtor in the District. For the case to which this case may be consolidated, the court has denied extending the stay.

Prior Cases Filed and Dismissed Within One-Year Period Prior to April 12, 2016 Filing of Current Case

Debtor has had two bankruptcy cases which were pending and dismissed within the one-year period prior to the commencement of the current case: Prior Chapter 7 Case No. 15-90083, Dismissed on June 10, 2015; and Prior Chapter 7 Case No. 16-21004, dismissed March 7, 2016. The prior cases being dismissed within the one-year period prior to the filing of this case brings into play the statutory provisions of 11 U.S.C. § 362(c)(4)(A), which provides:

(c) Except as provided in subsections (d), (e), (f), and (h) [not applicable to subparagraph (c)(4)] of this section-

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more

single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [not applicable to the current case filing], the stay under subsection (a) shall not go into effect upon the filing of the later case;....

Thus, it appears that there is no automatic stay which has, or can, go into effect in the current case.

Debtor is not left without possible relief, as 11 U.S.C. § 362(c)(4)(B) provides that the court may impose a stay, if the Debtor, **by clear and convincing evidence**, can rebut the statutory presumption that the filing of the current case, in light of the prior pending and dismissed cases, is in bad faith. 11 U.S.C. § 362(c)(4)(D). Debtor has not requested that the court impose a stay.

No evidence has been presented to the court with the present Motion. Debtor does not even allege as to why the court should find that this fourth filed Chapter 7 case can be filed in good faith.

In reviewing the Docket for Case no. 15-26355, the court notes Debtor filed a Motion to Extend Automatic Stay in that case. 15-26355, Dckt. 20. A statement (not a declaration under penalty of perjury) is attached to the motion in which Debtor asserts:

- A. Debtor lives with his son and fiancé in Stockton, California.
- B. Debtor wants to extend the automatic stay until January 16, 2016.
- C. Debtor wants to extend the automatic stay until January 16, 2016, to allow them to move to a new house. Debtor references there being a pending unlawful detainer.
- D. Debtor states that due to the holidays (motion filed on December 28, 2016), moving has been difficult.

Motion to Extend Automatic Stay; *Id.* at 2-3.

Related Bankruptcy Filings

Debtor is not a stranger to the court, having filed multiple earlier cases. The earliest is 13-27216, which was filed on May 28, 2013 and dismissed on September 5, 2013. In that case, the court discussed that Debtor's cases were related to multiple prior bankruptcy filings by April Dawn Gianelli, Debtor's significant other at the time. 13-27216; Civil Minutes, Dckt. 76. The court's files show that Ms. Gianelli has filed ten cases since 2005, which consists of:

- A. One cases in 2013:
 - 1. Chapter 7 No. 13-23345
 - a. Filed.....March 13, 2013

- b. Dismissed.....August 7, 2013
- B. Two cases in 2012:
 - 1. Chapter 7 No. 12-37035
 - a. Filed.....September 21, 2012
 - b. Dismissed.....January 8, 2013
 - 2. Chapter 7 No. 12-27743
 - a. Filed.....April 23, 2012
 - b. Dismissed.....September 12, 2012
- C. Two cases in 2011:
 - 1. Chapter 13 No. 11-36909
 - a. Filed.....July 8, 2011
 - b. Dismissed.....September 16, 2011
 - 2. Chapter 13 No. 11-21143
 - a. Filed.....January 14, 2011
 - b. Dismissed.....April 1, 2011
- D. Two Cases in 2010:
 - 1. Chapter 7 No. 10-39164
 - a. Filed.....July 21, 2010
 - b. Dismissed.....January 7, 2011
 - 2. Chapter 13 No. 10-26720
 - a. Filed.....March 18, 2010
 - b. Dismissed.....July 14, 2010
- E. One Case in 2009:
 - 1. Chapter 13 No. 09-32653
 - a. Filed.....June 19, 2009
 - b. Dismissed.....February 17, 2010
- F. One Case in 2005:

1. Chapter 7 No. 05-39406
 - a. Filed.....October 14, 2005
 - b. Discharge Entered.....March 2, 2006

In connection with Ms. Gianelli's bankruptcy case 13-23345, the U.S. Trustee filed an Adversary Proceeding seeking an injunction barring her further bankruptcy filings. Adv. Proc. 13-2090. Judgment was granted the U.S. Trustee against the Debtor in that Adversary Proceeding. The conduct of Ms. Gianelli in filing bankruptcy cases in the name of this Debtor is reviewed by the court in its Order to Show Cause, and May 31, 2013 Civil Minutes. 13-27216, Dckts. 18 and 37.

DISCUSSION

Upon the commencement of a bankruptcy case the bankruptcy estate, into which all property of the debtor is transferred by operation of law, is created. 11 U.S.C. § 541(a). Property of the bankruptcy estate is not property of the Debtor unless abandoned by the Trustee (either as approved by order of the court, upon dismissal of the case, or closing of the bankruptcy case). 11 U.S.C. §§ 554(a) or (b), 349(b)(3), 554(c).

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).

In 11 U.S.C. § 101 Congress has defined "debtor" as a person, whether living or entity such as a corporation, partnership or limited liability company, (11 U.S.C. § 101(13)); estate and property of the estate (11 U.S.C. § 541(a)); and exempt property (11 U.S.C. § 522). These terms for individuals, entities, estate, and property are all defining different things. The terms "debtor," "estate," "property of the estate," and "property of the debtor" are not terms describing the same thing.

Congress created the automatic stay as specified in 11 U.S.C. § 362(a). The automatic stay applies and stays actions with respect to a number of persons, items, and acts, including:

- A. Commencement or continuation of action **against the debtor** [11 U.S.C. § 362(a)(1)];
- B. Enforcement of a judgment obtained prior to the commencement of the case against,
 1. **Property of the Debtor** or
 2. **Property of the Estate** [11 U.S.C. § 362(a)(2)];

- C. Any act to obtain possession of **property of the estate, property from the estate**, or exercise control over **property of the estate** [11 U.S.C. § 362(a)(3)];
- D. Any act to create, perfect, or enforce any lien against **property of the estate** [11 U.S.C. § 362(a)(4)]; and
- E. Any act to create, perfect, or enforce a lien, which secures a claim which arose before the commencement of the case, against property of the debtor [11 U.S.C. § 362(a)(5)]

As shown in 11 U.S.C. § 362(a), Congress recognizes that the debtor, property of the debtor, and property of the estate are different.

In 11 U.S.C. § 362(c) Congress provides that the automatic stay terminates, without order of the court, in the following circumstances:

- a. As to property of the estate, when such property is no longer property of the estate [11 U.S.C. § 362(c)(1)];
- b. The stay of any other act until the earlier of:
 - i. The case is closed;
 - ii. The case is dismissed; or
 - iii. The time the debtor is granted or denied a discharge [11 U.S.C. § 362(c)(2)(A), (B), and (C)].

To address a perceived abuse of the Bankruptcy Code by repeat filers, Congress provides in 11 U.S.C. § 362(c)(4) that the automatic stay does not go automatically into effect in a bankruptcy case if there were two or more prior cases filed by the debtor which were dismissed within one year of the bankruptcy case then before the court. The language used by Congress in § 362(c)(4) is that "the stay under subsection [362](a) shall not go into effect upon the filing of the later case [then before the court]." Congress clearly provides that the entire stay provided for in 11 U.S.C. § 362(a) will not go into effect.

Here, the Movant is requesting relief pursuant to 11 U.S.C. § 362(d)(1) in order for the Movant to continue the unlawful detainer action.

On May 5, 2016, the court entered an order determining that no automatic stay has gone into effect with the filing of the instant bankruptcy case pursuant to 11 U.S.C. § 362(c)(4)(A).

11 U.S.C. § 362(c)(4)(A)(ii) allows the court to enter an order confirming that no stay is in effect at the request of a party in interest. At the time the instant Motion was filed, the court had not yet considered the Debtor's Motion to Impose the Automatic Stay. It was not until after this that the court issued the order confirming such.

Out of an abundance of caution, the court construes the instant Motion pursuant to 11 U.S.C. § 362(c)(4)(A)(ii) for an order confirming that the

automatic stay never went into effect at the time of filing.

Movant also requests that the court issue a further affirmative order stating that this order will be effective in any other bankruptcy case filed by Debtor in the next 180 days. The grounds upon which such relief is based is not clearly identified in the Motion. No points and authorities providing the court with the legal basis for such relief is provided to the court. Congress has expressly addressed the situation where a debtor (or series of debtors) file multiple bankruptcy cases with the intent to hinder, defraud, or delay creditors with respect to specific property. See 11 U.S.C. § 362(d)(4). Such relief has not been requested and the court makes no ruling, either granting or denying such relief, in the context to this Motion.

Based upon the evidence submitted, the court determines that no automatic stay went into effect upon the filing of the instant case on April 12, 2016.

Movant has provided sufficient cause for the court to grant relief waiving the fourteen-day stay of enforcement arising under Federal Rule of Bankruptcy Procedure 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 Cindy O'Leary ("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 court determines that no automatic stay went into effect upon the filing of this case. 11 U.S.C. § 362(c)(4)(A).

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement arising pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other or additional relief is granted.