

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

June 12, 2014 at 10:00 a.m.

-
1. [12-92728-E-7](#) ANGELITO/SARAH LUGUE MOTION FOR RELIEF FROM
PD-1 AUTOMATIC STAY
4-25-14 [[43](#)]
FLAGSTAR BANK, FSB VS.

Final Ruling: No appearance at the June 12, 2014 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, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on April 25, 2014. By the court's calculation, 48 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.

Flagstar Bank, FSB ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 5251 Damar Ct, Riverbank, California (the "Property"). Movant has provided the Declaration of Andrea Bilek to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Bilek Declaration states that there are 2 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$3,544.76 in post-petition payments past due. The Declaration also provides evidence that there are 9 pre-petition payments in default, with a pre-petition arrearage of \$15951.42.

From the evidence provided to the court, and only for purposes of this

June 12, 2014 at 10:00 a.m.

- Page 1 of 11 -

Motion for Relief, the total debt secured by this property is determined to be \$250,153.62, as stated in the Bilek Declaration and Schedule D filed by Anelito and Sarah Lugue ("Debtor"). The value of the Property is determined to be \$191,468.00, as stated in Schedules A and D filed by Debtor.

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. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

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.

Because Movant has established that there is no equity in the property for Debtor and no value in excess of the amount of Movant's claims as of the commencement of this case, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

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 Flagstar Bank, FSB 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 immediately vacated to allow Flagstar Bank, FSB, 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 5251 Damar Ct, Riverbank, California.

No other or additional relief is granted.

2. 14-90150-E-11 MIGUEL/SILVIA TOSCANO MOTION FOR RELIEF FROM
WTL-4 Thomas O. Gillis AUTOMATIC STAY
5-22-14 [82]
FOCUS BUSINESS BANK VS.

Tentative Ruling: The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the 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 offers 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.

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)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, Official Committee of Creditors Holding General Unsecured Claims/creditors holding the 20 largest unsecured claims, and Office of the United States Trustee on May 22, 2014. By the court's calculation, 21 days' notice was provided. 14 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)(2). The 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. At the hearing -----.

The Motion for Relief From the Automatic Stay is denied without prejudice.

Focus Business Bank ("Movant") seeks relief from the automatic stay with respect to the real properties commonly known as 1200 6th Street, Modesto, California ("6th Street Property") and 3200 Sierra Street, Riverbank, California ("Sierra Street Property"), in addition to personal property collateral described in the Commercial Security Agreement, which is substantially all of Debtor's personal property assets and an assignment of all rents, issues and profits from each of the 6th Street Property and Sierra Street Property. Movant has provided the Declaration of Kenneth A. Corsello to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

STATING GROUNDS WITH PARTICULARITY

However, the Motion for Relief from Stay does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does state with particularity the grounds upon which the requested relief (relief from stay) is based. The motion is a combined Notice of Motion and Motion which fails to set forth the grounds for the sought relief.

A review of the Motion identifies the following being stated with particularity:

- A. Notice is given that a hearing will be conducted on June 12, 2014.
- B. Movant seeks an order terminating the automatic stay to "exercise any rights and remedies afforded [Movant] under the documents evidencing the indebtedness...and/or otherwise afforded to [Movant] under applicable law with respect to any and all collateral securing the indebtedness."
- C. Failure of the Debtors or attorney to appear at the hearing may result in the court granting the requested relief.
- D. No written opposition is required.
- E. The Motion is based on [and the court is instructed to read] the following documents to understand the basis for the relief and specific relief requested:
 - 1. The Notice of Hearing [which doubles as the motion for Movant];
 - 2. The Memorandum of Points and Authorities;
 - 3. The Relief From Stay Summary Sheet;
 - 4. Declaration of Kenneth A. Corsello filed on March 7, 2014 (identified at Docket Numbers 27, 28, 32, and 33)
 - 5. Supplemental Declaration of Kenneth A. Corsello;

6. All other pleadings;
7. All other paper, and
8. All other records on file in this case.

Notice of Motion and Motion, Dckt. 72.

In substance, the above "motion" is an instruction for the court to canvas all of the pleadings in the file, assemble what the court thinks that the Movant would assert as grounds for the Motion; assemble for Movant the evidence the court believes the Movant would use to support the grounds the court believes the Movant would state in support of the motion; assemble an argument based on such grounds and evidence the court believes that Movant would state in support of the motion; advance such argument for the Movant, and then rule on Movant's "motion" which the court has assembled and argued.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the short-and-plain-statement standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter

similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual

arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

This is grounds to deny the motion.

THE COURT HAS PREPARED AN ALTERNATIVE RULING IN THE EVENT THAT MOVANT CAN ADDRESS THE DEFECTIVE PLEADING ISSUES AND SHOW PROPER GROUNDS WHY THE RELIEF SHOULD BE GRANTED.

ALTERNATIVE RULING

The Corsello Declaration states that Debtor has not obtained Movant's consent to use cash collateral and continues to use Movant's cash collateral, regardless of objection to use. The cash collateral is secured by the Property and Assets, with a total of \$1,115,067.85 owed.

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 \$1,082,991.32 (including \$1,042,264.80 secured by Movant's first deed of trust for 6th Street Property), as stated in the Corsello Declaration and Schedule D filed by Miguel and Silvia Toscano ("Debtor"). FN.1. The value of the Property is determined to be \$425,000 as stated in Schedules A and D filed by Debtor.

FN.1. Schedule D fails to reflect Movant's lien on the Sierra Street Property. Schedule D does confirm that Debtor owes Bank \$1,042,264.80 (Dckt. 22).

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. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). Furthermore, cash collateral cannot be used, sold, or leased unless each entity that has an interest consents or such use is authorized by the court. 11 U.S.C. § 362 (c)(2).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

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.

Because Movant has established that there is no equity in the property for Debtor and no value in excess of the amount of Movant's claims as of the commencement of this case, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

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 Focus Business Bank 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 immediately vacated to allow Focus Business Bank, 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 properties commonly known as 1200 6th Street, Modesto, California and 3200 Sierra Street, Riverbank, California.

No other or additional relief is granted.

3. [13-91459](#)-E-11 LIMA BROTHERS DAIRY
WJS-1

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
9-26-13 [[34](#)]

AMERICAN AGREDIT, PCA VS.

CONT. FROM 4-10-14, 3-6-14, 2-13-14, 1-16-14, 10-31-13, 10-10-13

Tentative Ruling: The Motion for Relief from Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the 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 offers 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.

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) (iii).

Local Rule 9014-1(f) (2) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on September 26, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. That requirement was met.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the 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. The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court issues its ruling from the pleadings filed by the parties.

The Motion for Relief from the Automatic Stay is xxxx.

American AgCredit, PCA ("Movant") seeks relief from the automatic stay with respect to an asset identified as the Dairy Herd and milk pool quota. The moving party has provided the Declarations of Teresa Rose, Eric Capron, and Steve Gallichio to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. Movant seeks relief pursuant to 11 U.S.C. § 362(d) (1), as cause exists because there is a potential for damage to the dairy herd from insufficient feed.

The Rose Declaration states that Debtor had borrowed total of \$2,561,128.14 from Movant. There have been post-petition payments received by milk check assignment, which may serve to decrease the total debt slightly.

The Capron Declaration states that Debtor had approximately 60 days of feed on hand on August 20, 2013. However, supplements needed to be purchased to generate feed mix with appropriate nutrition level (estimated cost of \$50,000). As of September 4, 2013, Debtor has failed to file a motion to appoint a broker to liquidate the herd.

The Gallichio Declaration states that he performed a Dairy Valuation. He found that additional feed will need to be purchased. Also, the Debtor did not have supplements such as oat hay, straw or corn stalks for supplements with alfalfa. There are 3,403 animals which he valued at \$2,880,500.

Movant argues that it has been in contact with Debtor's Counsel and understood that the herd would be sold, but no motion to sell has been brought forward and then the September 11, 2013 status report by the Debtor also stated that Debtor expected to employ a broker to sell its livestock. However, no such motion has been filed to date.

PRIOR HEARINGS

Stipulation for Relief and Continued Hearing

The parties stated on the record a stipulation to grant the Motion and modifies the automatic stay the hearing to modify the stay to allow Movant to exercise its rights in the "Dry Cows," "bred heifers," "open heifers," "bucket calves (0-6 months)." For this relief, the 14-day stay of enforcement is waived. The hearing is continued as to the balance of the motion and collateral to 10:00 a.m. on October 31, 2013.

No additional documents have been filed to date either arguing for or against further relief from the stay.

DECEMBER 11, 2013 ORDER

On December 11, 2013, the court continued the hearing on the motion for relief from the automatic stay. Dckt. 81.

JANUARY 8, 2014 ORDER

On January 8, 2014, the court ordered that the hearing on the Motion for Relief be continued until February 13, 2013, to be heard at 10:00 am. Dckt. No. 98. It was further ordered that any opposition to the Motion be filed on or before January 30, 2014, and that any reply to opposition to the Motion be filed on or before February 6, 2014.

FEBRUARY 3, 2014 ORDER

On February 3, 2014, the court ordered that the hearing on the Motion for Relief be continued until March 6, 2014 at 10:00 a.m., and trailed to be heard with the Chapter 11 Case Status Conference on the 3:30 p.m. calendar. Dckt. No. 136. It was further ordered that any opposition to the Motion be filed on or before February 20, 2014, and that any reply to opposition to the Motion be filed on or before February 27, 2014.

Nothing has been filed to date in conjunction with this Motion for Relief to date.

MARCH 6, 214 HEARING

The court notes the Status Conference Statement states that the Debtor-in-Possession has requested that Ag Credit agree to continue the hearing on this motion 30 days to give the Debtor-in-Possession time to file a Plan and Disclosure Statement.

The parties filed a stipulation to continue the hearing to April 10, 2014.

APRIL 10, 2014 HEARING

The parties filed a stipulation to continue the hearing to May 22, 2014. Dckt. 190.

MAY 22, 2014 HEARING

The parties filed a stipulation to continue the hearing to June 12, 2014. Dckt. 232.

JUNE 12, 2014 HEARING

At the hearing...