UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 11, 2017, at 1:30 p.m.

1.	**15-28108-E-11** **RLC-11**	**WILLARD BLANKENSHIP** **Stephen Reynolds**	**CONTINUED MOTION TO APPROVE PROPOSED DISTRIBUTION PURSUANT TO CONFIRMED PLAN OF REORGANIZATION** **5-15-17 [192]**

APPEARANCE OF MICHAEL KLETCHKO, PATRICK RUEDIN, MARC LAZO, ESQ. (COUNSEL FOR KLETCHKO AND RUEDIN), WILLARD BLANKENSHIP, AND STEPHEN REYNOLDS, ESQ. (COUNSEL FOR WILLARD BLANKENSHIP) REQUIRED FOR THE JULY 11, 2017 HEARING

NO TELEPHONIC APPEARANCE PERMITTED

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession/Plan Administrator, Debtor in Possession's/Plan Administrator's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2017. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Approve Proposed Distribution 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 to Approve Proposed Distribution is denied.

Willard Blankenship ("Plan Administrator/Debtor") moves for a court order approving a proposed distribution to claims under the confirmed plan. Plan Administrator/Debtor states that the Plan contemplated selling real property in Indiana, selling Debtor in Plan Administrator/Debtor's interest in stock of Apnea Analysis, and refinancing his residence in Davis, California. All three of those have occurred.

Plan Administrator/Debtor reports that the Plan calls for proceeds from the refinancing to be distributed in two parts: 1) one portion when the refinancing closes and 2) a second portion thirteen months later. *See* Dckt. 123, at 9 (stating that the second portion will be disbursed twelve months later, not thirteen). The refinancing close on January 26, 2017, and the Estate received the initial disbursement from it on January 31, 2017.

An order approving sale of the Apnea Analysis stock was entered on January 13, 2017; the Estate received $5,000.00 prior to the hearing. Dckt 181. An order approving sale of real property in Indiana was entered on January 23, 2017, for an overbid purchase price of $171,000.00. Dckt. 185. Plan Administrator/Debtor states that net proceeds from the real property sale of $158,275.00 were received on March 3, 2017.

Proceeds from the two sales and from the refinancing totaled $283,955.00. $43,365.00 was disbursed in attorney's fees, and $85,337.92 was disbursed to Michael Kletchko and Patrick Ruedin in Class 2, pursuant to the Plan. After those distributions, the net proceeds balance is $155,252.08.

Plan Administrator/Debtor reports that there is a change in the total funds received from refinancing his residence. The Plan estimates total funds of $301,202.00, but the realized funds will be $232,665.58. $63,774.33 is held back by the lender for property taxes and insurance, as required by the Department of Housing and Urban Development. That hold back was triggered by transferring the property in Indiana back into the Estate.

Now, Plan Administrator/Debtor proposes to distribute the net proceeds available. After deducting $20,000.00 for estimated priority claims, that amount is $135,252.08. Plan Administrator/Debtor proposes a pro rata distribution to Classes 2 & 3 in the following amounts:

Name	**Claim Amount**	**Percent of Class**	**Amount**
Kletchko & Ruedin, per Plan	$916,762.16	86.80%	$106,134.20
Davis Law Firm, Proof of Claim 4	$45,526.55	4.31%	$9,507.43
American Express, Proof of Claim 5	$1,985.14	0.18%	$397.06

Sleep Train, Proof of Claim 6	$5,315.42	0.50%	$1,102.95
Ameri Gas, Schedules	$187.00	0.02%	$44.12
Davis Smiles Dentistry, Schedules	$1,500.00	0.14%	$308.83
Kevin Apman, Schedules	$10,000.00	0.95%	$2,095.61
Melissa Collier, Schedules	$3,500.00	0.33%	$727.95
Robert Blankenship, Schedules	$3,500.00	0.33%	$727.95
Robert Kidd, Schedules	$1,500.00	0.14%	$308.83
Wright National Flood Insurance	$832.00	0.08%	$176.47
Yury Galprin, Schedules	$65,552.10	6.21%	$13,698.64
Total Interim Disbursement			**$135,230.02**

From the above proposed distribution, Plan Administrator/Debtor states that the amount for Kletchko & Ruedin is less than 86.8% of $135,252.08 to reflect funds distributed previously.

CREDITORS' OBJECTION

Michael Kletchko and Patrick Ruedin ("Creditors") filed an Objection on May 30, 2017. Dckt. 197. Creditors state that the reserve (hold back) from the refinancing was previously undisclosed and unconsented to. Creditors argue that they have been deprived of $63,774.33, and if they had known about the hold back, then they would not have agreed to it.

Creditors request that they receive the entirety of the remaining funds in the amount of $111,985.58 from the sale of real property in Indiana and from the sale of Apnea Analysis stock.

Additionally, Creditors object to the following Class 2 and Class 3 claims:

A. Davis Law Firm, Proof of Claim 4, in the amount of $17,183.53;

B. Melissa Collier, Schedules, in the amount of $1,058.98;

C. Robert Blankenship, Schedules, in the amount of $1,058.98; and

D. Yury Galpin, Schedules, in the amount of $20,536.14.

Creditors argue that Section C, Paragraph 4.01 of the Plan assigns to them the right to object to claims of Class 3 related to *Kletchko v. Blankenship*. Case No. 30-2010-00399196, Orange County Superior Court.

Creditors object to Davis Law Firm, Proof of Claim 4, on the grounds that the invoices submitted are "exaggerated and enhanced." Dckt. 197, at 3. Creditors argue that Davis Law Firm represented Plan Administrator/Debtor in the state court case from January 2014 to September 2014 and only filed a single motion to set aside judgment. Creditors argue that more than 90% of Davis Law Firm's claim is for an unfiled and unscheduled motion for summary judgment.

Creditors object to Yury Galprin's scheduled claim on the grounds that the services rendered are overstated and were not necessary for defending Plan Administrator/Debtor in the state court case. Creditors argue that their attorney's fees in the state court case are comparable to those billed by Yury Galpin ($196,325.50), but Creditor's attorney was involved in the case since June 2010, more than five years longer than Yury Galprin was involved in the case. Creditors object to the claim because of the disproportion in fees billed against time involved in the case.

Creditors object to claims of both Melissa Collier and Robert Blankenship as being undocumented loans that were given to Plan Administrator/Debtor without any stated purpose. Creditors argue that Melissa Collier and Robert Blankenship are Plan Administrator/Debtor's children, and their claims were submitted without supporting documents, such as bank statements showing the alleged loans.

Creditors argue that they have incurred $71,820.00 in post-petition attorney's fees in this case, in addition to fees that were awarded in the state court case. Creditors request to be paid the remaining $111,985.58 in proceeds, or alternatively, they request a briefing schedule.

PLAN ADMINISTRATOR/DEBTOR'S REPLY

Plan Administrator/Debtor filed a Reply on June 6, 2017. Dckt. 200. Plan Administrator/Debtor states that—as reported already—the $63,774.33 hold back required by the mortgage lender was unanticipated and could not have been disclosed prior to plan confirmation. Counsel states that he communicated that problem to Creditors prior to closing the refinancing. Plan Administrator/Debtor argues that the shortage is partially offset by the prompt sale of Apnea Analysis stock and the excess proceeds received from selling property in Indiana.

Plan Administrator/Debtor argues that Creditors' Objection does not object to claims in the manner contemplated in the Plan. He argues that the Plan provided for Creditors to have standing to object to the claims of Davis Law Firm and Yury Galprin Lieber Law Firm. Dckt. 123, at 6:15–22. He states that opposition to the other two claims of his children do not satisfy Federal Rules of Bankruptcy Procedure 2002 and 3007, as well as Local Bankruptcy Rule 3007-1.

JUNE 15, 2017 HEARING

At the hearing, the court continued the matter to 1:30 p.m. on July 11, 2017. Dckt. 207. The court ordered that attorneys for the parties meet and confer on or before noon on June 26, 2017, to address the status of the Plan in this case, possible alternatives, and develop (if possible) a report to be given orally to the court at the July 11, 2017 hearing of any agreed solution to the current status of the case. Dckt. 208.

The court also ordered that Michael Kletchko, Patrick Ruedin, Marc Lazo, Willard Blankenship, and Stephen Reynolds appear personally at the July 11, 2017 hearing. Finally, the court ordered that if the parties resolve their disputes, then they must file a written stipulation on or before July 6, 2017, at which point the court will entertain *ex parte* motions for leave to appear telephonically.

REVIEW OF PLAN

The Plan in this case was confirmed on October 11, 2016. Dckt. 153. The Plan description for Class 2 includes language that Creditors "shall have the right to object to the claims of Class 3 General Unsecured Creditors filed by the Davis Law Firm and the claim scheduled as Yury Galprin Lieber Law." *Id.*, at 6:19–22.

The ability to object to claims is not unlimited, with the Confirmed Plan creating an express 180-day limitation. The Confirmed Plan, ¶ 6.04 (misnumber ¶ 5.04 under Article V of the Plan, p. 8 of Plan) requiring that all objections be filed within 180 days of the effective date. Plan attached to Confirmation Order, Dckt. 153. In the Class 2 Claim Treatment, ¶ 4.01, p. 5 of Plan, the Confirmed Plan expressly provides for Creditors to have the right to object to the claims filed by Davis Law Firm and the claim schedule for Yury Galprin Lieber Law. *Id.* The Confirmed Plan further provides that the "Effective Date" is fourteen business days following the entry of the order confirming the Plan. *Id.*; Plan ¶ 7.02, page 10 of Plan. The Order confirming the Plan was entered on the court's docket on October 11, 2016. The fourteenth business day after entry on the docket is October 31, 2016. April 29, 2017 is the 180th day after October 31, 2016.

For a deadline to object to claims, the Plan states that "[a]ll claim objections, including the claims objections allowed to Class 2 . . . shall be filed within 180 days of the Plan Effective Date." *Id.*, at 8:26–28. The Effective Date of the Plan is October 31, 2016, which is the requisite fourteen business after the October 11, 2016 entry of the order confirming the Plan. Dckt. 153. One hundred and eighty days later is April 29, 2017.

CREDITORS APRIL 4, 2017 PLEADING

On April 4, 2017, Creditors filed a pleading titled:

> "MICHAEL KLETCHKO AND PATRICK RUEDIN'S
> STATEMENT OF OBJECTION AND RESERVATION
> OF RIGHTS TO CONTEST CLASS 3 CLAIMS"

Dckt. 189. This document was not served on anyone and appears to be Creditors' dictate to Debtor, other parties in interest, and the court.

In the Statement, Creditors make the following pronouncements:

A. Creditors object to the first phase of distribution as set forth in the terms of the Confirmed Plan.

B. Creditors assert that they have been deprived of $63,774.33 that is to be paid to them from the reverse mortgage that is to fund the first phase of distribution under the Confirmed Plan.

C. Creditors request that the court set a hearing to determine whether the parties can resolve this dispute.

D. Creditors also now object to the Confirmed Plan Phase 2 sale of the Indiana Property. Creditors assert that the sale has occurred but the Plan Administrator/Debtor has failed to account for or distribute any of the proceeds.

Reservation, Dckt. 189.

Other than advising the court that Creditors are "annoyed," no legal action is taken or initiated with the above pleading.

Creditors have not filed any objections to claims in this case, a right they specifically bargained for in the Chapter 11 Plan.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 3007 governs the procedure for objecting to claims. In relevant part, it states:

> (a) Objections to claims. An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claim, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.
>
> . . .
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> (c) Limitation on joinder of claims objections. Unless otherwise ordered by the court or permitted by subdivision (d), objections to more than one claim shall not be joined in a single objection.

FED. R. BANKR. P. 3007 (a) & (c). Federal Rule of Bankruptcy Procedure 3007 (d) & (e) provide the mechanisms for presenting an omnibus objection to claims.

Local Bankruptcy Rule 3007-1 provides additional measures in this district for objecting to claims. That rule states:

> An objection to a proof of claim shall include the name of the claimant, the date the proof of claim was filed with the Court, the amount of the claim, and the number of the claim as it appears on the claims register maintained by the Court. Unless the basis for the objection appears on the face of the proof of claim, the objection shall be accompanied by evidence establishing its factual allegations and demonstrating that the proof of claim should be disallowed. A mere assertion that the proof of claim is not valid or that the debtor is not owed is not sufficient to overcome the presumptive validity of the proof of claim.

LOCAL BANKR. R. 3007-1(a). The Local Rules establish that such objections must be set for hearing on either forty-four or thirty days' notice. LOCAL BANKR. R. 3007-1(b)(1) & (2). Short notice may be deemed inadequate by the court. *See, e.g.*, *In re Ambassador Park Hotel, Ltd.*, 61 B.R. 792 (N.D. Tex. 1986) (deeming eight days' oral notice of hearing on Chapter 11 debtor's objection to creditor's claim to be inadequate under Federal Rule of Bankruptcy Procedure 3007).

Local Bankruptcy Rule 9014-1(d)(1) states that "every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except that relief in the alternative based on the same statute or rule may be filed in a single motion."

DISCUSSION

Nothing further has been filed since the June 15, 2017 hearing.

It appears that Creditors' April 4, 2017 filed Reservation spawned the May 15, 2017 filing of the present Motion. In the present Motion Plan Administrator/Debtor seeks court approval to make an interim distribution under the confirmed plan. No claims have been objected to by any party in interest.

The Confirmed Chapter 11 Plan requires that Creditors be paid an initial disbursement on their Class 2 secured claim from the first reverse mortgage to be completed within an estimated thirty-days of the effective date. Confirmed Plan, Class 2 treatment, page 5 of Plan; Dckt. 153. No specific dollar amount is stated in the Class 2 treatment. However, in Article VII of the Plan (titled "Means for Implementation of the Plan"), it states that the monies from the first reverse mortgage will be $132,567.00. This section further provides that the $132,567.00 will be "distributed first to allowed or pending priority claims and the remainder to Class 2 claims." *Id.*, Plan p. 9:20–21.

In the Motion, Plan Administrator/Debtor is oddly silent and does not provide any information about the initial distribution from the first reverse mortgage, other than saying:

> "The refinancing was much more difficult than contemplated preconfirmation and did not close until January 26, 2017. The estate did not receive the initial disbursement from the loan until January 31, 2017."

Motion, ¶ 3, Dckt. 192.

The Plan Administrator/Debtor (the fiduciary serving under the Confirmed Plan) did not (or refused) to file a declaration in support of the Motion. He offers no testimony of how the Plan has been performed.

However, the attorney for the Plan Administrator/Debtor has chosen to be a witness and testify in support of this Motion. The personal knowledge testimony under penalty of perjury by Stephen Reynolds, attorney for the Plan Administrator/Debtor includes the following:

A. That the "underwriters" kept requiring additional documents, which delayed the closing until January 26, 2017. Declaration, p. 1:22–24; Dckt. 194.

B. Counsel further testifies that there were "statutory education requirements that were surprisingly difficult to meet." *Id.*, p. 1:25–27.

C. However, Counsel testifies that there was an even larger difficulty, with the lender requiring that funds for property taxes and insurance for the entire duration of the reverse mortgage be set aside. *Id.*, p. 1:25–28, 2:1.

At this point, it appears that such a requirement is merely impounding monies that Debtor intended to pay into the future.

D. Counsel further testifies that this requirement was "triggered" because the Indiana property (which Debtor had transferred out of his name prior to the commencement of the case) was recovered as a fraudulent conveyance. *Id.*, p. 2:2–8.

E. Counsel provides testimony that the Indiana Property was sold, generating proceeds of $158,275, and the Apnea Analysis stock was sold, generating proceeds of $5,000.00. *Id.*, p. 2:16–17.

F. Counsel testifies that the disbursements from both the **first and second** reverse mortgage fundings total only $120,000.00. *Id.*, p. 2:17–18.

G. From the funds, attorney's fees of $43,365.00 were paid to Counsel and an initial payment of $85,337.92 was paid to Creditors. *Id.*, p. 2:18–20.

Using the amounts stated in the Plan to be paid, Creditors would be receiving a distribution of approximately $89,000.00 from just the first funding from the reverse mortgage. The Plan states that the second funding of the reverse mortgage was to provide an additional $168,635.00. Plan, Article VII, p. 9 of Plan; Dckt. 153.

In the Opposition to this Motion, Creditors argue that by the undisclosed reserve requirement, Plan Administrator/Debtor has effectively diverted $63,774.33 of the reverse mortgage monies that are to be distributed to Creditors. This money has been diverted to pay Plan Administrator/Debtor's future

property taxes and insurance—obligations that Plan Administrator/Debtor would otherwise have to pay from his assets outside of the Plan.

Creditors argue that if they had been told that Debtor would be taking $63,774.33 of the reverse mortgage moneys away from Creditor, they would not have agreed to and would not have supported the Plan. As the "500 lb. gorilla" creditor in this case, such loss of support would likely have doomed any plan.

Creditors then continue, arguing that even though they have elected not to file objections to claims and have not complied with the requirements of the Confirmed Plan, they "object" to four claims by virtue of mentioning them in passing in objecting to the present Motion.

Just as Creditors complain that Plan Administrator/Debtor has not complied with the Plan and the proposed distribution, Creditors ignore the Plan and now try to unfairly attack other creditors. Creditors ignore the Bankruptcy Code (11 U.S.C. § 502), the Federal Rules of Bankruptcy Procedure (Rule 3007), the Local Bankruptcy Rules, and the Confirmed Plan. Creditors create their own rules and law of how they will blindside other creditors and operate outside the law.

It is often said that a party "earns" the opponent it has in litigation. It appears, based on the conduct of Creditors and the Plan Administrator/Debtor, they are cut from the same bolt of litigation and ethical cloth.

The court has previously addressed the shortcomings of the Plan Administrator/Debtor, Creditors, and their respective counsel in their "prosecution" of this bankruptcy case. Examples include:

> [1] failure of Plan Administrator/Debtor to file evidence in support of motion to confirm; Civil Minutes, p. 8, Dckt. 149;
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> [2] Creditors filing an "objection" to administrative fees which stated no specific opposition; Civil Minutes, p. 4, Dckt. 150;
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> [3] Denial of Creditors' motion to dismiss the case, Creditors not stating grounds for dismissal; Civil Minutes, p. 4–6, Dckt. 103;
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> [4] Dismissing Creditors contention that the recording of their judgment lien was not based on an "antecedent debt," Creditors cannot ignore the statutory presumption of insolvency under 11 U.S.C. § 547, the contention of forbearance was not supported by the evidence, and Creditors asserted "baseless grounds" in requesting relief; Civil Minutes, p. 6–8, Dckt. 62;
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> [5] Dismissal of Creditor's complaint against non-debtor third-parties for relief under 11 U.S.C. § 523 for failing to state a claim for which relief could be granted against non-debtors under that provision of the Bankruptcy Code; Adv. Pro. 16-2010, Civil Minutes, p. 13–14; and
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> [6] Creditors failing to show any legal basis for trying to unilaterally exercise the powers of a debtor in possess/trustee under 11 U.S.C. §§ 547 and 548; *id.*, p. 15–16;

In Adversary Proceeding 16-2010 the court perceived the litigation conduct of Plan Administrator/Debtor and Creditors to be "sandbox litigation," well below that required in federal court proceedings. 16-2010; Civil Minutes, p. 15–16, Dckt. 38. The court observed that the pleadings disclosed a "toxic, less than professional, relationship between [Creditors and Plan Administrator/Debtor] in the State Court [proceedings that set the stage for the bankruptcy case filing]." *Id.*, p. 17. The Civil Minutes include extensive quotations of the less than professional conduct that one expects from parties engaging in litigation, even in state court. This court's conclusions included:

> "Several things are clear. First, the issues between the parties have become personal issues between the attorneys. Proper, ethical, litigation appears to have become secondary to personal attacks and perceived, or allegations of, perceived threats.
> . . .
> Third, due to the long, hostile, history between the attorneys for Plaintiffs, Plaintiffs, Debtor, and Attorneys for Debtor, it will not be the Plaintiffs who would be authorized to exercise the fiduciary powers of the Debtor in Possession. No request has been made of the court and the court will not, *sua sponte*, turn over property of the estate to these Plaintiffs.
>
> Finally, the information disclosed by Plaintiffs, Plaintiffs' counsel, Defendants, and Defendants' counsel may well show that the appointment of a Chapter 11 Trustee is necessary and proper. These parties and their attorney have become so embroiled in personal, vitriolic attacks, the rights and interests of the estate appear secondary. "

Id., p. 19.

Based on the testimony of Plan Administrator/Debtor's Counsel, the Plan Administrator/Debtor was fully aware that he was not able to perform the Plan as confirmed through the refinance. Rather than coming back to court and addressing the issue, Plan Administrator/Debtor found it to be to his advantage to elect a path that would give him a $63,774.33 benefit and divert that amount away from Creditors. Adopting the adage, "It is better to seek forgiveness rather than request permission" is not an effective, productive strategy in bankruptcy proceedings. FN.2.

FN.2. This statement is often attributed to Rear Admiral Grace Hopper, and while possibly has strategy merit on the battlefield where those who act with permission are the victors and can give themselves forgiveness, the same is not true in the judicial process where there is not a "battlefield victor" who dictates the decisions to the judge.

Creditors have sat back, appearing to be in a state of somnolence while not getting paid the monies they believed they were entitled to under the Plan. Though negotiating hard to have the right to object to claims, Creditors have let those rights lapse in apparent disinterest in this case. Now, belatedly, Creditors believe they have the right and power to hide what may be objections to claims in a response to the present Motion. No certificate of service has been filed for Creditors' Opposition to the present Motion. FN.3.

FN.3. In what may be a contest with Plan Administrator/Debtor's counsel to go from being an attorney for a client whose communications are protected to being a witness subject to examination, Creditors' Counsel Marc Lazo jumps into the fray with his Declaration. Declaration, Dckt. 198. In it, he offers testimony under penalty of perjury concerning the legal services he provided for Creditors and presents himself as the "unbiased" witness to provide expert testimony about the claims of other attorneys for which Creditors elected not to file any opposition.

Stephen Reynolds, Plan Administrator/Debtor's attorney, was compelled to respond with another tit-for-tat declaration making him a further witness, rather than attorney for a party, in this case. He again testifies to "facts" that should be known by the Plan Administrator/Debtor.

It appears that between the litigation strategy of the Plan Administrator/Debtor, Creditors, and their respective counsel, they have driven this case to one in which it probably will have to be converted or dismissed. It appears that conversion may well be the better option so that an independent fiduciary can figure out how the strategies and conduct of these Parties and their counsel have damaged the bankruptcy estate and other creditors. At the time, the Motion is denied.

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.
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> The Motion to Approve Proposed Distribution filed by Debtor in Possession/Plan Administrator having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Motion is denied.

2. **17-22866-E-13** **ABEL RUSFELDT** **MOTION FOR RELIEF FROM**
MRG-1 **Dale Orthner** **AUTOMATIC STAY**
6-14-17 [35]

CERTIS PN 1, LLC. VS.

THE HEARING ON THIS MOTION WILL BE CONDUCTED ON THE COURT'S 3:00 CHAPTER 13 LAW AND MOTION CALENDAR TO BE HEARD IN CONJUNCTION WITH THE OBJECTIONS TO CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN

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)(2) 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, and Office of the United States Trustee on June 14, 2017. By the court's calculation, 27 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). 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 denied.

Abel Rusfeldt ("Debtor") commenced this bankruptcy case on April 28, 2017. Certis PN 1, LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 5408 Iron Point Court, Rocklin, California ("Property"). Movant has provided the Declaration of Howard Huang to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Huang Declaration states that Debtor is not the borrower under the Note secured by the Property. The Declaration states that Maria De Los Angeles Torres Lopez is the actual Borrower, and there are two post-petition defaults in the payments on the obligation secured by the Property, with a total of $2,229.92 in post-petition payments past due.

Additionally, Movant argues that Debtor filed the instant bankruptcy case as part of a scheme to hinder or delay Movant from foreclosing.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee filed an Opposition on June 20, 2017. Dckt. 51. The Trustee argues that there is no cause for relief because the Huang Declaration was filed on May 5, 2017, which was after the first payment was due but before it was late and before any payment would issue under the Plan. The Trustee notes that Debtor filed a plan that provides for this creditor and for plan payments to the Trustee beginning on May 25, 2017. The Trustee reports that the May 25, 2017 payment was made, and the Trustee in turn paid Movant. Nevertheless, the Motion was filed afterward on June 14, 2017.

The Trustee argues that Creditor has not filed a notice pursuant to Federal Rule of Bankruptcy Procedure 3002.1(c) for a $16.00 late fee and therefore does not appear entitled to receive the late fee—meaning there is no cause for relief.

The Trustee states that Debtor has an interest in the Property because he has listed Borrower as his married spouse of eleven years and has listed the Property as his resident in which he has an equitable interest. Additionally, the Trustee notes that a senior lienholder filed a claim.

The Trustee argues that there is no proof of a scheme because Debtor is current under the proposed plan that proposes to pay Movant's pre-petition arrears and ongoing payments.

MOVANT'S REPLY

Movant filed a Reply on July 3, 2017. Dckt. 54. Movant reasserts that Debtor is not the Borrower and cannot reorganize the debt secured by the Property. Movant insists that it and Debtor have not privity of contract.

Movant cites the court to examples of courts finding that no debt exists to a third-party debtor. *See In re Parks*, 227 B.R. 20, 23–24 (Bankr. W.D.N.Y. 1998) ("To revive an agreement under which the debtor had no rights, or to revive a legal status that only someone other than the debtor may assert, is nonsensical . . . [t]here are many policy reasons why one should not be permitted to acquire property . . . that is subject to a lien, and then use Sec. 1322(b)(2) power to 'modify' against the lienor who never dealt with that debtor."); *In re Kizelnik*, 190 B.R. 171, 176 (Bankr. S.D.N.Y. 1995) ("[The bank] may not foreclose on its collateral so long as a stranger to the mortgage, who accepts no personal liability for the indebtedness, chooses to make payments."); *In re Jones*, 98 B.R. 757, 758 (Bankr. N.D. Ohio 1989) ("Because the debtor is not liable on the mortgage, there exists no debt owing to the Bank; the Bank has no claim against the Debtor, and there exists no creditor-debtor relationship.").

Movant cites the court to 11 U.S.C. § 105(a) for the statement that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement any court orders or rules, or to prevent an abuse of process."

From that point, Movant then argues that Debtor's plan violates 11 U.S.C. § 524(e). Movant argues that it entered into an agreement with Borrower as her sole and separate property and that Debtor seeking a discharge is an improper use of 11 U.S.C. § 506.

In response to the Trustee, Movant argues that possession of the Property does not create standing to propose treatment of the Property in a plan. Also, Movant argues that a senior lienholder filing a claim does not indicate standing for Debtor.

Movant argues that its receipt of post-petition payments (or any lack thereof) is not part of the grounds for the Motion.

Finally, Movant argues that a scheme between Debtor and Borrower can be inferred because Debtor filed this bankruptcy case on the eve of Movant foreclosing on the Property after it was part of Borrower's dismissed bankruptcy case.

OPPOSITION OF DEBTOR

The Motion was noticed for hearing using the procedures provided in Local Bankruptcy Rule 9014-1(f)(2). Using such procedure, opposition may be presented orally at the hearing, with the court determining whether such stated opposition warrants further filing of pleadings and final hearing.

At the hearing, counsel for Debtor stated **xxxxxxxxxxxxxxxxxxxx**.

DISCUSSION

First, the court notes that Movant appears to remove one of the grounds for relief sought in the Motion. In Movant's Reply, Movant argues that any lack of receiving post-petition payments is not part of the grounds for the Motion, explicitly in contravention of the Motion that includes blocked language about payments being missed. FN.1. Movant's decision to drop that argument appears to be in response to the Trustee illustrating that such ground for relief was premature given that payments were received by the Trustee under the proposed plan and that Movant had not filed a notice for post-petition fees.

FN.1. **"2. Lack of Post-Petition Payments**

> In light of Movant's receipt of the post-petiiton [sic] payments. The lack thereof is not grounds for the Motino [sic] for Relief."

Motion, p. 5:15–17.

Movant argues that "cause" for relief exists because Debtor is not listed on the original note and there is no grant deed to Debtor. As the Trustee has shown—and Movant has admitted—Debtor has a possessory, equitable interest in the Property. Even the senior lienholder has filed a claim in this case.

Claim as Defined by the Bankruptcy Code

Movant correctly directs the court to 11 U.S.C. § 101(10) & (5) for the basic definition of a creditor. First, the term "creditor" is defined as:

> "(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) [pre-conversion], 502(f) [involuntary case], 502(g) [rejection claim], 502(h) [avoidance claim] or 502(I) [specified tax claims] of this title; or
>
> (C) entity that has a community claim."

11 U.S.C. § 101(10). The term "community claim" is defined in 11 U.S.C. § 101(7) as:

> "(7) The term "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case."

The type of property specified in 11 U.S.C. § 541(a)(2) is:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
> . . .
>
> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--
>
> > (A) under the sole, equal, or joint management and control of the debtor; or
> >
> > (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
>
> The term "claim" is defined by the Bankruptcy Code as:
>
> 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.

11 U.S.C. § 101(5).

Here, Movant asserts that is has a "right to payment" that is secured by the Property. Debtor asserts that he has an interest in the Property. Whether as community property or as property of the estate under 11 U.S.C. § 541(a)(1), Debtor claiming other than a community property interest in the Property, Movant is asserting a right to payment for which the collateral is claimed to be property of the bankruptcy estate.

In his Bankruptcy Schedules, Debtor states under penalty of perjury:

A. Debtor has an [nonspecific] "equitable interest" in the Property. Schedule A, Part 1 ¶ 1.1; Dckt. 1 at 11.

B. Debtor further states that he only has an interest in the Property and that nobody else has an interest in the Property. Thus, it appears Debtor states that his right to the Property is to a 100% interest and whomever is in legal title has no interest in the Property. *Id.*

C. Debtor states that the Property has a value of $480,000.00 and that the value of his portion is $480,000.00 (which is consistent with stating that nobody else has an interest in the Property). *Id.* at 17.

D. On Schedule C, Debtor asserts a $100,000.00 homestead exemption pursuant to California Code of Civil Procedure § 704.730.

California Code of Civil Procedure § 704.730 specifies the amount of a homestead exemption a "family unit."

E. On Schedule D, Debtor lists Nationstar Mortgage as having a $280,000.00 claim secured by the Property. *Id.* at 21. Additionally, "Note Servicing Center" is listed as having an $111,000.00 claim secured by the Property. (This appears to be Movant's Claim.) *Id.*

F. On Schedule J, Debtor lists having Monthly Net Income of $2,575.81. *Id.* at 36. The expenses included in generating this net income number includes payment of a $1,932.19 monthly mortgage payment.

G. On Schedule I, Debtor states that it is Debtor who generates substantially (91.9%) all of the monthly income of Debtor and his spouse. *Id.* at 33–34.

The Chapter 13 Plan filed by Debtor provides for a $2,575.00 monthly plan payment for a term of sixty months. In Class 1, Debtor provides for curing a $50,000.00 arrearage on Movant's claim with an $833.33 monthly payment, in addition to the $549.46 current post-petition monthly payment on Movant's claim. Plan, ¶ 2.08(c); Dckt. 7. The Plan, in Class 4, provides for Debtor making the Nationstar mortgage payment in the monthly amount of $1,932.19 directly to that creditor. Plan, ¶ 2.11; *Id.*

Finally, the Trustee has noted that Debtor was not prohibited by law from filing the present case, regardless of any motive to prevent a foreclosure sale. There is nothing suspicious about filing a bankruptcy case to prevent a debtor's mortgage-holder from foreclosing on property.

Request for Attorney's Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

Request for Relief from the Fourteen-Day Stay

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

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 Certis PN 1, LLC ("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 is denied.