UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 2, 2016 at 1:30 p.m.

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1. **16-23350-E-13** **JODY/JOY SILVA**
EAT-1 **Michael Croddy**

MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY AND/OR MOTION FOR RELIEF FROM AUTOMATIC STAY
6-30-16 [12]

WELLS FARGO BANK, N.A. VS.

Final Ruling: No appearance at the August 2, 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, Debtor's counsel, Chapter 13 Trustee, and Office of the United States Trustee on June 30, 2016. By the court's calculation, 33 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 to Confirm Termination or Absence of Stay is granted.

Wells Fargo Bank, N.A. ("Movant") seeks confirmation that the automatic stay did not go into effect upon commencement of the instant case with respect to the real property commonly known as 1667 Halverson Court, Folsom, California (the "Property").

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee filed a response to the instant Motion on May 31, 2016. Dckt. 30. The Trustee states that the Debtor is current under the proposed plan. The Debtor has paid a total of $4,800.00 to date with the payment received July 11, 2016.

The Trustee has made no disbursements in this case. The Movant avers that no foreclosure proceeding is pending. The Trustee states that if the plan is confirmed can result in the Trustee making payments to the Movant notwithstanding relief from stay or the expiration of the stay, and the creditor bound by the terms of the plan.

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.

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

The Debtor has filed four cases since 2010, two filed and dismissed within the one year period prior to the commencement of the present bankruptcy case:

1. Case No. 14-28308

   a. Chapter 13
   b. Filed August 15, 2014

c. Dismissed on September 20, 2015 due to delinquency in plan payments.

2. Case No. 15-28605

a. Chapter 13
b. Filed on November 4, 2015
c. Dismissed on April 21, 2016 due to delinquency

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...the stay under subsection (a) shall not go into effect upon the filing of the later case. 11 U.S.C. § 362 (c)(4)(A)(I). On request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect. 11 U.S.C. 362(c)(4)(A)(ii).

The automatic stay did not go into effect upon the filing of the instant case because the Debtor has 2 cases pending and dismissed within the previous year.

The Movant has alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 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 Wells Fargo Bank, N.A. having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS FURTHER ORDERED** that the court confirms that no automatic stay went into effect as of the filing of the instant Chapter 13 case (Case No. 16-22761) on April 29, 2016, pursuant to 11 U.S.C. § 362(c)(4) .
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.
>
> No other or additional relief is granted.

2. **11-45395-E-13** **NADER SHAHCHERAGHI** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY**
APN-1 **Peter Macaluso** **4-21-16 [84]**

LAKESIDE GREENS HOMEOWNERS ASSOCIATION VS.

Tentative Ruling: 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).

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.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct 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 April 21, 2016. By the court's calculation, 33 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). The defaults of the non-responding parties are entered.

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

Lakeside Greens Homeowners Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3401 Bermuda Ave, Apt. 26, Davis, California (the "Property"). Movant has provided the Declaration of Peg Hart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Hart Declaration states that there are 54 post-petition defaults in the payments on the obligation secured by the Property, with a total of $23,649.08 in post-petition payments past due.

According to the Declaration of Peg Heart, the manager of Lakeside Green Homeowners Association, the defaults date back to November 1, 2011. Declaration, Dckt. 86. She testifies that the Homeowners' Association suffered,

A. The first post-petition default in November 2011, and Movant did nothing;

B. Then the second post-petition default in December 2011, and Movant did nothing;

C. Then the third post-petition default in January 2012, and Movant did nothing;

D. Then the fourth post-petition default in February 2012, and Movant did nothing;

E. Then the fifth post-petition default in March 2012, and Movant did nothing;

these monthly now, in April 2016, defaults continued, with;

F. The twelfth post-petition default in October 2012, and Movant did nothing;

G. Then the thirteenth post-petition default in November 2012, and Movant did nothing;

these monthly now, in December 2012, continued, with;

H. The twenty-fourth post-petition default occurring in October 2013, and Movant did nothing;

I. Then continuing monthly, with the thirty-sixth post-petition default occurring in October 2014, and Movant did nothing;

J. Then continuing monthly, with the forty-eight post-petition default occurring in October 2015, and Movant did nothing; until

K. The fifty-fourth continuing monthly default which occurred in April 2016, when Movant "sprung" to action.

The Hart Declaration fails, or is careful to not provide, any explanation as to why and how, if there is a bona fide obligation owing, the Homeowner's Association failed to act.

The court notes that after slumbering for fifty-four months, for which there are alleged to be association dues owning, Movant demands that the court waive the normal fourteen-day stay of enforcement, because now, years later, Movant claims that it is not adequately protected.

The Movant is seeking relief from the automatic stay as well as relief from the co-debtor stay pursuant to 11 U.S.C. § 1301.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 10, 2016. Dckt.

90. The Trustee states that the Debtor is $1,700.00 delinquent under the plan. The Creditor is included in Class 2A to be paid a monthly dividend of $264.47 with an interest rate of 4.75%. The Creditor has filed Proof of Claim No. 7 in the amount of $14,135.31 for pre-petition HOA Assessments. The Trustee has disbursed $12,784.46 principal and $1,775.66 interest on the claim. The Debtor's confirmed plan does not contain any provisions regarding post-petition HOA assessments.

DEBTOR'S OPPOSITION

The Debtor filed an opposition to the Motion on May 17, 2016. Dckt. 93. The Debtor states that the plan provides for the pre-petition arrears. The Debtor incorrectly made the assumption that the ongoing, post-petition payments to Creditor were covered in the plan.

While Debtor is delinquent in payments to Creditor, Debtor argues that he should not be penalized with the loss of his property for the way the Plan was proposed and confirmed. The Debtor seeks a provision that will allow him to cure the post-petition delinquency.

The Debtor asserts that he will be current on or before the hearing.

MAY 24, 2016 HEARING

At the hearing, both Parties requested that the court continue the hearing so that they and their clients could further pursue a settlement to address the underlying issues. The court continued the hearing to 1:30 p.m. on June 14, 2016.

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 $241,984.08 (including $23,649.08 secured by Movant's assessment lien), as stated in the Hart Declaration and Schedule D filed by Nader Shahcheraghi ("Debtor"). The value of the Property is determined to be $385,295.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Property for Movant's claim provides adequate protection 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).

With respect to the present Motion, Movant has shown that it is adequately protected. First, it has a lien in property with more than enough value to pay any debt – so long as such debt is actually owning and enforceable. Second, Movant has shown that it is adequately protected by choosing not to act for almost five years.

Movant's conduct is inconsistent with that of a homeowner's association which is actually providing services for which dues are owing. It is inconsistent with a creditor who is actually owed a debt. Movant, while having the opportunity to explain to the court some reasonable basis for the financial somnolence, if there is actually a debt owing, has chosen not to do so.

Debtor's Opposition

Debtor's opposition is equally lacking. First, Debtor fails (or refuses) to provide any evidence to support the arguments advanced by his current attorney in opposing the Motion. All that is argued is that Debtor "assumed" that the future, post-petition dues would (somehow) be paid as part of a pre-petition claim. Debtor does not (or will not) so testify, but merely this is argued by his counsel.

Next, Debtor's counsel assures that court that Debtor will find almost $24,000.00 between the May 17, 2016 filing of the Opposition and the May 24, 2016 hearing. Opposition, p. 2:7-8; Dckt. 93. If the Debtor has access to such a large sum of money, then the financial information provided to the court under penalty of perjury to support a less than 100% plan appear suspect.

As between Debtor and Movant, Debtor's argument is less non-credible then Movant's arguments and evidence.

JUNE 14, 2016 HEARING

At the hearing, the parties agreed to continue the matter to 1:30 July 19, 2016, to allow them to document a settlement.

JULY 19, 2016 HEARING

The parties appeared and requested a continuance, stating that they are in the process of documenting a settlement. The hearing was continued

DISCUSSION

To date, no supplemental papers have been filed in connection with the instant Motion.

The court denies the Motion without prejudice. With just months left in the current Chapter 13 Plan, it appears doubtful that Debtor can cure the arrearage, if one actually exists. If Debtor can produce the money to cure the almost $24,000.00 arrearage in one fell swoop, then the Chapter 13 Trustee and creditors have some time to investigate further and determine whether the current plan is in good faith and consistent with the Bankruptcy Code.

Therefore, the Motion is denied without prejudice.

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 Lakeside Greens Homeowners Association ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, the Parties jointly requesting that the hearing be continued, and good cause appearing,

IT IS ORDERED that the hearing on the Motion for Relief From the Automatic Stay is denied without prejudice.