UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 6, 2013 at 1:30 p.m.

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1. 12-37003-E-13 DOROTHY BROOKINS
PAZ-2 Peter G. Macaluso

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
5-31-13 [155]

POINTS WEST FINANCIAL GROUP SPE, LLC VS.

CONT. FROM 7-2-13

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 May 30, 2013. By the court's calculation, 33 days' notice was provided.

Final Ruling: The Motion for Relief from the Automatic Stay was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) and Local Bankruptcy Rule 9014-1(d).

The court's decision is to grant the Motion for Relief from Automatic Stay. 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 shall issue its ruling from the pleadings filed by the parties.

PRIOR HEARING

Points West Financial Group SPE, LLC seeks relief from the automatic stay with respect to the real property commonly known as 7309 Pocket Road, Sacramento, California. The moving party has provided the Declaration of Ron Bradenburg to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

However, moving party has failed to properly move for relief pursuant to Local Bankruptcy Rule 9014-1(d)(3), specifying that the notice of hearing shall advice potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and address of the persons who must be served with any opposition.

In addition, Movant failed to serve Debtor's counsel with the Motion and supporting pleadings. In its reply brief Movant argues that it should be excused from providing the minimal service required. It only argues that since an information electronic notice that pleadings have been filed sent by the court should replace Movant's obligation to serve the pleadings on counsel. No showing has been made that Debtor's counsel has consented to receipt of electronic service. Local bankruptcy Rule 7005-1, or that such electronic service was accomplished by Movant.

While dismissal of the Motion, and requiring Movant to file a new Motion (and pay a new filing fee), the Debtor's defaults under the proposed plan raise serious issues in this case. Previously the court required the Debtor to make $5,000.00 a month adequate protection payments to Movant. Order, Dckt. 100. In February 2013, the Debtor (represented by her current counsel) represented to the court that she had sufficient monies to make the current monthly payments on Movant's claim and all arrearage cure payments. Civil Minutes, Dkct. 94.

The Chapter 13 Trustee advises the court that the Debtor has made the following payments to the Trustee:

2/19/13	$3,000
2/19/13	$3,000
3/6/13	$5,000
3/14/13	$5,000
4/26/13	$5,500
5/13	no plan payment
6/7/13	$5,500

Of these Plan Payments, the Trustee was to pay to Movant $10,000.00 in February 2013, and then $5,000.00 a month each month thereafter, pending further order of the court. When allowing for $5,000.00 a month payments for March, April, and May, as of the filing of the present Motion, Movant should have been paid $25,000.00. Order, Dckt. 100.

The Trustee reports that as of June 18, 2013, he had disbursed $20,000.00. Dckts. 166, 167.

On June 18, 2013, the court denied confirmation of the Debtor's proposed Chapter 13 Plan. In denying confirmation, the court had serious questions concerning the Debtor's statements of her expenses, the changing expense amounts, and her defaults in the court's prior order requiring Movant to receive a $5,000.00 a month adequate protection payment. Civil Minutes and Order, Dckts. 169, 173.

While the Debtor's Opposition to the present Motion properly raises the failure to serve counsel, Debtor also raises several other points. One is a contention (for which she provides no testimony or other evidence) that she is diligently prosecuting this case. It is argued (by counsel) that the Debtor commenced the case in pro se, but has now obtained counsel. That was at least 5 months ago. Substitution of counsel filed on January 29, 2013. Dckt. 82. Engaging counsel, in and of itself, after five months, is not the be all and end all of diligent prosecution.

What Debtor has not done is properly pay the Trustee sufficient plan payments to make the $5,000.00 a month adequate protection payments. In denying confirmation, the court found that the Debtor did not present evidence of having sufficient income to fund that plan.

The court continued the hearing to allow Movant to properly serve Debtor's counsel, the Debtor to file a substantive opposition (supported by competent evidence), and then conduct a hearing on the merits. Movant was to properly serve Debtor's Counsel on or before July 5, 2013. Debtor was to file and serve their opposition before July 19, 2013. Finally, the Movants reply, if any, was to be filed and served on or before July 26, 2013.

DISCUSSION

A review of the docket shows that Movant filed supplemental pleadings, showing the Debtor's counsel had been served the motion and supporting pleadings on June 3, 2013. Dckt. 177.

No substantive opposition has been filed by the Debtor to date. Therefore, the court addresses the merits of the motion.

The Brandenburg Declaration states that the Debtor has not made 5 post-petition payments, with a total of $24,034.96 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be $657,934.51, secured by movant's first trust deed, as stated in the Brandenburg Declaration, while the value of the property is determined to be $350,000.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when the 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 since the debtor has not made post-petition payments. 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 has no equity, it is the burden of the debtor 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 to the court, and no opposition or showing having been made by the Debtor or the Trustee, the court determines that there is no equity in the property for either the Debtor or the Estate, and the property is not necessary for any effective reorganization in this Chapter 13 case.

The court shall issue a minute order terminating and vacating the automatic stay to allow Points West Financial Group SPE, LLC, 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 the moving party has established that there is no equity in the property for the Debtor and no value in excess of the amount of the creditor's claims as of the commencement of this case, the moving party is not awarded attorneys' fees for all matters relating to this Motion.

The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Points West Financial Group SPE, LLC, 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 7309 Pocket Road, Sacramento, California.
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> No other or additional relief is granted.

2. 13-27381-E-13 ROBERT PLOUGHE
SC-2 Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY
7-9-13 [33]

GRANITE RANCH OPPORTUNITIES, LLC VS.

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 13 Trustee, and Office of the United States Trustee on July 8, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Final 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). 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 respondent and other parties in interest 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. No appearance required.

Granite Ranch Opportunities, LLC seeks relief from the automatic stay with respect to the real property commonly known as 2249 Wild Plains Circle, Rocklin, California. The moving party has provided the Declarations of Olivia Reyes and Cinzia Pera to introduce evidence which establishes that the Debtor is no longer the owner of the property, movant having purchased the property at a pre-petition Trustee's Sale on January 3, 2013. Debtors are tenants at sufferance, movant commenced an unlawful detainer action in Placer County Superior Court.

Movant has provided a certified copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership. Based upon the evidence submitted to the court, and no opposition having been made by the Debtor or the Trustee, the court determines that there is no equity in the property for either the Debtor or the Estate, and the property is not necessary for any effective reorganization in this Chapter 13 case. 11 U.S.C. § 362(d)(2).

The court shall issue a minute order terminating and vacating the automatic stay to allow Granite Ranch Opportunities, LLC, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 2249 Wild Plains Circle, Rocklin, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The moving party 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 a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Granite Ranch Opportunities, LLC and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 2249 Wild Plains Circle, Rocklin, California.
>
> **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.
>
> No other or additional relief is granted.

3. 13-20888-E-13 ABRAHAM/RACHAEL BERCILES MOTION FOR RELIEF FROM
LEH-1 Scott A. CoBen AUTOMATIC STAY
7-11-13 [25]

HYUNG OH VS.

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 13 Trustee, creditors, and Office of the United States Trustee on July 11th, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Relief from the Automatic Stay without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Hyung Oh seeks relief from the automatic stay with respect to the real property commonly known as 10208 Pedra do Sol Way, Elk Grove, California. The moving party has provided the Declaration of Lyle Havens, Debtor's Attorney, to introduce evidence which establishes that the Debtor is not the owner of the property, movant having at all times owned the property in question.

Movant's attorney, Lyle Havens, filed his declaration under penalty of perjury attesting to the following facts:

Facts to which he has personal knowledge:

a. He is an attorney at law.

b. On January 23, 2013, Debtor filed his petition in bankruptcy.

c. Movant cause a three day notice to pay rent or quit to be served on the Debtors June 10, 2013, seeking payment of $880.00 rent for June, 2013, reflecting Debtor's payment of $1,000 as partial payment. (No basis is given for the witness to have personal knowledge of this fact).

d. It is his understanding that this notice is not proper under California law because it also includes late fees and unpaid water bills. If the motion for relief is granted, leave to serve a superseding three day notice to pay rent or quit listing only unpaid rent should be included in the order.

e. Moving party lacks adequate protection of moving party's ownership interest in the property. Suck lack of adequate protection is comprised of the necessity of paying the expenses and the debts associated with the premises while being denied an income from said property and/or the lawful use and enjoyment of the premises. Debtors are unable or unwilling to provide adequate protection to Creditor. The automatic stay is resultin gin a decrase in the value of moving party's interest and the deprivation of the use and enjoyment of said property.

Hearsay is defined in Fed. R. Evid. 801 to be a statement (oral, written, or nonverbal conduct intended as an assertion) made by a person other than the one testifying before the court which is offered for the truth of the matter asserted. To the extent that Mr. Havens is merely parroting information that he reads in copies of documents provided from the Movant, he is providing hearsay testimony. Mr. Havens does not testify that he is a custodian of records for Movant Hyung Oh. Therefore, Mr. Havens testimony is not admissible.

As such, Debtor has failed to authenticate the several exhibits submitted in support of the Motion. Movant's declaration does not authenticate the exhibits, nor do none of the exhibits appear to be self-authenticating. Therefore the court does not have admissible evidence to consider to support the contentions set out in the motion.

The motion is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor 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 without prejudice.