

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

September 1, 2015 at 1:30 p.m.

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1. [13-29907](#)-E-13 SYAMPHAI LIEMTHONGSAMOUT CONTINUED MOTION FOR RELIEF
EAT-1 Scott Shumaker FROM AUTOMATIC STAY
6-10-15 [[81](#)]
MIDFIRST BANK 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, mortgagors, parties requesting special notice, and Office of the United States Trustee on June 10, 2015. By the court's calculation, 41 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 is granted and the court shall issue an adequate protection order.

Midfirst Bank("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3669 Reel Circle, Sacramento, California

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(the "Property"). Movant has provided the Declaration of Misty Honeysuckle to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Honeysuckle Declaration states that there are 3 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$2,934.18 in post-petition payments past due.

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 \$72,038.15 (including \$21,489.15 secured by Movant's first deed of trust), as stated in the Honeysuckle Declaration and Schedule D filed by Syamphai Liemthongsamout ("Debtor"). The value of the Property is determined to be \$90,000.00, as stated in Schedules A and D filed by Debtor.

David P. Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on June 15, 2015.

Debtor, in his timely filed reply, states that the Movant's claim is for a second deed of trust on real property where his mother resides, which was only mistakenly left out of Debtor's Confirmed Plan. However, Debtor indicated on his Schedule D that Movant holds a first deed of trust, on which his mother pays directly. Schedule D, Dckt. 1. Debtor further asserts that he will cure the arrears by the time of this hearing, and will file a Modified Plan within 7 days of his reply. A review of the Docket shows that Debtor has not yet filed a Modified Plan.

The Debtor requests that the court conditionally deny this Motion, contingent on whether Debtor cures post-petition arrears prior to the hearing on this matter. In the alternative, Debtor also states that he is in discussions with Movant's counsel, and requests a continuance so that they can work to resolve this matter.

JULY 21, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on September 1, 2015 in light of the parties stating that the parties have resolved the Motion by stipulation. Dckt. 96.

STIPULATION

The parties filed a stipulation regarding adequate protection on August 26, 2015. The Stipulation provides the following:

That the automatic stay shall remain in effect with respect to that certain real property commonly known as 3669 Reel Cir., Sacramento, California, subject to the following payment terms and conditions:

- a. The Debtor shall pay her regular post-petition monthly mortgage installments commencing on August 1, 2015 and continuing on the first day of each calendar month thereafter during the pendency of this bankruptcy case. Payments must be received before the expiration of any grace period allowed by the terms of the promissory note. The current monthly payment is \$978.06 but is subject to change pursuant to the terms of

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the promissory note.

- b. Funds should be sent and made payable to: Midland Mortgage, A division of Midfirst Bank, P.O. Box 26648, Oklahoma City, Oklahoma 73126, unless notified otherwise via monthly statements and/or coupon books. The Debtor's loan number should be notated on each payment.
- c. Upon any default in the terms and conditions set forth in the preceding paragraphs, Movant serve written notice upon the Debtor and Debtor's attorney (by facsimile and mail), allowing the Debtor fourteen (14) calendar days from the date of service to cure the default. If Debtor fails to cure the default within 14 days after service of such written notice, Movant may file and serve a declaration under penalty of perjury specifying the default, together with a proposed order terminating the stay, which the court may grant without further notice or hearing.
- d. Notwithstanding anything contained in this stipulation to the contrary, the Debtor shall be entitled a maximum of three (3) notices of default and opportunities to cure pursuant to paragraph 4 above. Once debtor has defaulted this number of times on the obligations imposed by the order on this Stipulation and has been served with this number of notices of default, Movant is relieved of any obligation to serve additional notices of default or to provide additional opportunities to cure. If an event of default occurs thereafter, Movant will be entitled, without first servicing a notice of default or providing the Debtor with an opportunity to cure, to file and serve a declaration under penalty of perjury setting forth in default the Debtor's failures to perform hereunder, together with a proposed order terminating the stay, which the court may enter without further notice or hearing
- e. The foregoing terms and conditions shall be binding only during the pendency of this bankruptcy case. If at any time the stay is terminated by court order or by operation of law, the foregoing terms and conditions shall cease to be binding and Movant may proceed to enforce its remedies under applicable non-bankruptcy law.
- f. If final relief from the automatic stay is granted, the Trustee shall not make any further payments on account of Movant's secured claim after entry of the order. The secured portion of Movant's claim is deemed withdrawn upon entry of the order without prejudice to movant's right to file an amended unsecured claim for any deficiency.

DISCUSSION

Reading the Stipulation, the parties are essentially stipulating to adequate protection through the continued payment of the mortgage payment of \$978.06 by Debtor's mother outside the plan, with Movant being entitled to an

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order granting relief from the stay after a maximum of 3 post-petition defaults or the failure of the Debtor to cure the default the first three instances of default.

Based on the Original Plan and the proposed First Modified Plan (Dckt. 94), Debtor has not, and is not, able to pay the debt which is Creditor's claim. The payments have to be made by Debtor's mother. See Debtor's current budget showing income and expenses; Exhibit 1, Dckt. 93.

The Debtor and Creditor having resolved this dispute by the Stipulation, and it being consistent with the proposed First Modified Plan, the court grants to Motion to provide adequate protection pursuant to the Stipulation, as follows:

- A. The payments to Creditor on the Claim shall be made outside of the Chapter 13 Plan during this bankruptcy case and shall not be made by Debtor, unless provided in a confirmed plan to be made by Debtor.
- B. Payments must be received before the expiration of any grace period allowed by the terms of the promissory note. The current monthly payment is \$978.06 but is subject to change pursuant to the terms of the promissory note. The payments are due on the first calendar of the month.
- C. Payments shall be sent and made payable to: Midland Mortgage, A division of Midfirst Bank, P.O. Box 26648, Oklahoma City, Oklahoma 73126, unless notified otherwise via monthly statements and/or coupon books. The Debtor's loan number should be notated on each payment.
- D. Upon any default in the timely payment for any month commencing with August 2015 and thereafter, Movant may serve written notice upon the Debtor and Debtor's attorney (by facsimile and mail), allowing the Debtor fourteen (14) calendar days from the date of service to cure the default. If Debtor fails to cure the default within 14 days after service of such written notice, Movant shall be granted relief from the automatic stay to proceed with a nonjudicial foreclosure sale and the purchase at the sale obtaining possession of the property.
- E. Additionally, Movant shall also be entitled to an order granting the above relief from the automatic stay if there are more than three defaults in the monthly payments due on the note after July 31, 2015.
- F. For either the default and failure to timely cure ground or the more than three default ground, Movant may request an order granting the relief from the automatic stay by an *Ex Parte* Motion to Amend this Adequate Protection Order. The *Ex Parte* Motion shall use the same docket control number as this Motion (DCN:EAT-1). Because the motion seeks to amend the order on this Motion for Relief, no further filing fee for the *Ex Parte* Motion to Amend is required.
- G. The *Ex Parte* Motion to Amend, and the supporting pleadings and evidence establishing the grounds for relief, shall be served on

Debtor and Debtor's counsel. Any opposition to the Ex Parte Motion, supported by credible, admissible evidence disputing the default grounds asserted, shall be filed and served within ten days of the Ex Parte Motion having been served on Debtor. If the Opposition is filed, Debtor shall notice the hearing on the Opposition for the court's first regular law and motion hearing date which is at least twenty days after service of the Motion on Debtor. If no opposition is filed or the hearing on opposition not timely set for the first available law and motion date which is at least twenty days after service of the Ex Parte Motion, Movant shall lodge with the court a proposed order granting the relief from the stay.

- H. The adequate protection relief granted is without prejudice to any other rights to seek relief from the stay, or termination of the stay by operation of law.
- I. If relief from the automatic stay is granted as provided in the Adequate Protection Order, the Trustee shall not make any further payments on account of Movant's secured claim after entry of the order.

The Motion is 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 Midfirst ("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 granted and the court orders adequate protection in the form of relief set forth in this order pursuant to the Stipulation of Debtor and Movant (Dckt. 102).

IT IS FURTHER ORDERED that:

- A. The payments to Creditor on the Claim shall be made outside of the Chapter 13 Plan during this bankruptcy case and shall not be made by Debtor, unless provided in a confirmed plan to be made by Debtor.
- B. Payments must be received before the expiration of any grace period allowed by the terms of the promissory note. The current monthly payment is \$978.06 but is subject to change pursuant to the terms of the promissory note. The payments are due on the first calendar of the month.
- C. Payments shall be sent and made payable to: Midland Mortgage, A division of Midfirst Bank, P.O. Box 26648, Oklahoma City, Oklahoma 73126, unless notified otherwise via monthly statements and/or coupon books. The Debtor's

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loan number should be notated on each payment.

- D. Upon any default in the timely payment for any month commencing with August 2015 and thereafter, Movant may serve written notice upon the Debtor and Debtor's attorney (by facsimile and mail), allowing the Debtor fourteen (14) calendar days from the date of service to cure the default. If Debtor fails to cure the default within 14 days after service of such written notice, Movant shall be granted relief from the automatic stay to proceed with a nonjudicial foreclosure sale and the purchase at the sale obtaining possession of the property.
- E. Additionally, Movant shall also be entitled to an order granting the above relief from the automatic stay if there are more than three defaults in the monthly payments due on the note after July 31, 2015.
- F. For either the default and failure to timely cure ground or the more than three default ground, Movant may request an order granting the relief from the automatic stay by an *Ex Parte* Motion to Amend this Adequate Protection Order. The *Ex Parte* Motion shall use the same docket control number as this Motion (DCN:EAT-1). Because the motion seeks to amend the order on this Motion for Relief, no further filing fee for the *Ex Parte* Motion to Amend is required.
- G. The *Ex Parte* Motion to Amend, and the supporting pleadings and evidence establishing the grounds for relief, shall be served on Debtor and Debtor's counsel. Any opposition to the *Ex Parte* Motion, supported by credible, admissible evidence disputing the default grounds asserted, shall be filed and served within ten days of the *Ex Parte* Motion having been served on Debtor. If the Opposition is filed, Debtor shall notice the hearing on the Opposition for the court's first regular law and motion hearing date which is at least twenty days after service of the Motion on Debtor. If no opposition is filed or the hearing on opposition not timely set for the first available law and motion date which is at least twenty days after service of the *Ex Parte* Motion, Movant shall lodge with the court a proposed order granting the relief from the stay.
- H. The adequate protection relief granted is without prejudice to any other rights to seek relief from the stay, or termination of the stay by operation of law.
- I. If relief from the automatic stay is granted as provided in the Adequate Protection Order, the Trustee shall not make any further payments on account of Movant's secured claim after entry of the order.

No other or additional relief is granted.

2. [14-29670-E-13](#) **CHERRONE PETERSON** **MOTION FOR RELIEF FROM**
JCW-1 **Peter Macaluso** **AUTOMATIC STAY**
8-3-15 [[149](#)]
SELECT PORTFOLIO SERVICING,
INC. VS.

Final Ruling: No appearance at the September 1, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney and the Chapter 13 Trustee on July 31, 2015 and August 3, 2015, respectively. By the court's calculation, 32 days' notice was provided to Debtor and Debtor's Attorney and 29 days' notice was provided to the Chapter 13 Trustee. 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.

U.S. Bank, N.A., successor trustee to LaSalle Bank National Association, on behalf of the holders of Bear Stearns Asset Backed Securities I Trust 2007-HE2, Asset-Backed Certificates Series 2007-HE2 in interest ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 8675 Elm Avenue, Orangevale, California (the "Property"). FN.1. David Cusick, the Chapter 13 Trustee, filed a nonopposition on August 13, 2015.

FN.1. The court notes for the Movant that the "Motion" presently before the court is the barest version of what is acceptable under Fed. R. Bankr. P. 9013 which requires that the motion "state with particularity" the grounds for relief. While the court is able to discern (barely) the particular grounds for

relief, the court notes that it will not offer such services in the future.

Movant has provided the Declaration of Chris Pink to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. The Pink Declaration states that there are 9 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$35,832.62 in post-petition payments past due. The Declaration also provides evidence that there are 66 pre-petition payments in default, with a pre-petition arrearage of \$224,984.76.

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 \$845,268.58 including by Movant's deed of trust, as stated in the Pink Declaration and Schedule D filed by Debtor. The value of the Property is determined to be \$472,162.00, 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).

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.

Movant requests, in only the prayer, a waiver of the 14-day stay under Fed. R. Bankr. P. 4001(a)(3). However, Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted. The court will not guess what possible grounds Movant is asserting, subject to Bankruptcy Rule 9011, to waive the 14-day stay, and what Movant is not certifying pursuant to Bankruptcy Rule 9011.

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 for all matters relating to this Motion. Additionally, Movant does not seek the allowance of any specific amount of attorneys' fees or provide evidence supporting such amount or why such fees are reasonable and necessary.

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 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 automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow U.S. Bank, N.A., successor trustee to LaSalle Bank National Association, on behalf of the holders of Bear Stearns Asset Backed Securities I Trust 2007-HE2, Asset-Backed Certificates Series 2007-HE2 in interest ("Movant"), 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 8675 Elm Avenue, Orangevale, 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 not waived.

IT IS FURTHER ORDERED that Movant, having established that the value of the Property subject to its lien not having a value greater than the obligation secured, Movant not requesting any amount of attorneys' fees, and Movant not provide evidence supporting an award of attorneys' fees or reasonableness of attorneys' fees, Movant is not awarded attorneys' fees as part of Movant's secured claim in the total amount of \$845,268.58 for all matters relating to this Motion.

No other or additional relief is granted.