

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

September 17, 2013 at 1:30 p.m.

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1. [13-31131](#)-E-13 SCOTT FRASER AND THELMA MOTION FOR RELIEF FROM  
CPG-1 WHITE AUTOMATIC STAY  
Robert McCann 9-3-13 [[11](#)]

EURO PACIFIC MORTGAGE, LLC  
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 Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 3, 2013. By the court's calculation, 14 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 grant the Motion for Relief from the Automatic Stay.** 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:

Euro Pacific Mortgage, LLC ("EURO") seeks relief from the automatic stay with respect to the real property commonly known as 4510 Capri Way, Sacramento, California. The moving party has provided the Declaration of Ajay Mengi to introduce evidence which establishes that the Debtors are no longer the owners of the property, movant having purchased the property at a pre-petition Trustee's Sale on August 14, 2013. Debtors are tenants at sufferance, and movant commenced an unlawful detainer action in Sacramento County Superior Court.

September 17, 2013 at 1:30 p.m.

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 Debtors or the Trustee, the court determines that there is no equity in the property for either the Debtors 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 Euro Pacific Mortgage, LLC ("EURO"), and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 4510 Capri Way, Sacramento, 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). FN.1.

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FN.1. The court has dismissed the bankruptcy case by order filed on September 10, 2013, for failure of the Debtors to file the following pleadings in this case: Attorney's Disclosure Statement, Chapter 13 Plan, Form 22C, Schedules A-J, Statement of Financial Affairs, Statistical Summary, and Summary of Schedules. This the second case filed for Thelman White. The first was her Chapter 7 case, No. 13-25123, filed April 15, 2013 and dismissed on July 8, 2013. Ms. While, who was represented by counsel David Ndudim, failed to appear at the first meeting of creditors. In light of the multiple filings and the evidence of Movant's ownership of the property, the court addresses the merits of this Motion.  
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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 Euro Pacific Mortgage, LLC ("EURO") and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 4510 Capri Way, Sacramento, 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.

2. [12-33383](#)-E-13 JOHN HOLLIS  
Pro Se

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-26-13 [[156](#)]

ANNIE HOLLIS VS.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, all creditors, and Office of the United States Trustee on August 26, 2013. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

**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.** 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:

Annie M. Hollis seeks relief from the automatic stay with respect to the real property commonly known as 7624 Tierra Arbor Way, Sacramento, California.

However, the Local Rules require that movant's notice of the hearing disclose whether or not the motion is filed under Bankruptcy Rule 9014-1(f)(1) or Bankruptcy Rule 9014-1(f)(2), and whether or not written opposition to the motion is required. See Local Bankr. R. 9014-1(d)(3). The notice provided here did not so specify. This is improper. Failure to comply with the local rules is grounds to deny the motion. See Local Bankr. R. 9014-1(l).

As evidence in support of the motion the Movant has provided the Declaration of Steven H. Berniker, Counsel for Debtor, to introduce evidence and authenticate the documents upon which Movant bases the claim and the obligation owed by the Debtor. Counsel's witness testimony, in addition to possibly waiving the attorney-client privilege with respect to these matters, is subject to the same rules as a non-attorney witness.

### **Federal Rules of Evidence**

The Federal Rules of Evidence are clear and straight forward with respect to what constitutes proper and competent evidence. These Rules include the following.

#### **Federal Rule of Evidence 602. Need for Personal Knowledge**

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703. FN.1.

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FN.1. WEINSTEIN'S FEDERAL RULES OF EVIDENCE MANUAL 2<sup>ND</sup> EDITION, MATTHEW BENDER & COMPANY, INC., ARTICLE VI, § 602.02

#### § 602.02 Purpose and Applicability of Rule

##### [1] Personal Knowledge as Most Reliable Evidence

A witness may testify only about matters on which he or she has first-hand knowledge. The witness's testimony must be based on events perceived by the witness through one of the five senses.

The Rule is an extension of the law's usual preference that decisions be based on the best evidence available, although this preference is not an actual rule of evidence. The Rule acknowledges that distortion increases with transfers of testimony, and that the most reliable testimony is obtained from a witness who has actually perceived the event.

Rule 602 permits evidence of the requisite personal knowledge to be provided either through the witness's own testimony or through extrinsic testimony. The Rule authorizes the judge to exercise some, although minimal, control over the jury by empowering the judge to reject inherently incredible testimonial evidence, something that rarely occurs (see § 602.03).

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Federal Rule of Evidence 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. FN.2.

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FN.2. WEINSTEIN'S FEDERAL RULES OF EVIDENCE MANUAL 2<sup>ND</sup> EDITION, MATTHEW BENDER & COMPANY, INC., ARTICLE VII, § 701.03, 701.06

§ 701.03 Requirements for Admissibility

[1] Opinion Must Be Based on Personal Perception

To be admissible, lay opinion testimony must be based on the witness's personal perception. This requirement is no more than a restatement of the traditional requirement that most witness testimony be based on first-hand knowledge or observation.

In its purest form, lay opinion testimony is based on the witness's observations of the event or situation in question and amounts to little more than a shorthand rendition of facts that the witness personally perceived. Lay opinion testimony is also admissible when the opinion is a conclusion drawn from a series of personal observations over time. Most courts have also permitted lay witnesses to testify under Rule 701 to their opinions when those opinions are based on a combination of their personal observations of the incident in question and background information they acquired through earlier personal observations....

§ 701.06 Trial Judge Has Broad Discretion to Admit or Exclude Lay Opinion Testimony

Trial courts have broad discretion in determining whether to admit or to exclude lay opinion testimony. This discretion applies both to the general decision to admit or exclude the evidence and to the subsidiary questions included in that determination:

Whether the opinion is based on the witness's personal perception.

Whether the opinion is rationally connected to the witness's personal perceptions.

Whether the opinion will assist the trier of fact in understanding the witness's testimony or in determining a fact in issue. (cont.)

Whether the probative value of the testimony outweighed its potential prejudicial effect.

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**Federal Rule of Evidence 801. Definitions That Apply to This Article; Exclusions from Hearsay**

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

**Federal Rule of Evidence 802. The Rule Against Hearsay**

Hearsay is not admissible unless any of the following provides otherwise:

- . a federal statute;
- . these rules; or
- . other rules prescribed by the Supreme Court.

**Personal Knowledge Testimony of Counsel**

Mr. Berniker provides his personal knowledge testimony relevant to the present Motion as to the following facts:

1. John W. Hollis (the Debtor) and Annie M. Hollis were married on March 25, 1979. The parties separated on March 1, 2011. [Mr. Berniker provides no basis for having any personal knowledge of the marriage 34 years ago.]
2. John W. Hollis and Annie M. Hollis separated on March 1, 2011. [Mr. Berniker provides no basis for having any personal knowledge of the separation.]
3. John W. Hollis filed for dissolution of marriage on September 27, 2012. [Mr. Berniker provides no basis for having any personal knowledge of the Debtor filing for dissolution of marriage.]
4. The Chapter 13 Plan filed on February 13, 2013 states that Husband is not paying the mortgage on the community residence located at 7624 Tierra Arbor Way and that Debtor is enjoying a reverse mortgage income at an amount unknown. [Other than possibly reading a document which is not now before the court, Mr. Berniker does not show a basis for having personal knowledge of the Debtor's plan in this case.]
5. Schedule A characterizes the real property as community property. The income is community. Creditor/Wife has not benefitted from the reverse mortgage. Debtor uses all income for his own use and benefit.
6. On February 13, 2013, Creditor filed a Motion to Compel Discovery and Debtor claimed that he was unable to comply with discovery because of this bankruptcy. The Superior Court

September 17, 2013 at 1:30 p.m.

ordered Debtor to produce documents and pay sanctions in the amount of \$680.00 but Debtor has failed to comply.

7. Schedule I shows Debtor is enjoying \$1,047.00 per month of pension income and Creditor asserts that the entire pension is community property. Creditor has not benefitted from the Debtor's pension.
8. Schedule I does not disclose the reverse mortgage or the income from it.
9. Schedule I shows that Debtor/Wife income at \$781.00 per month.
10. Wife is requesting relief from the stay so the state court can characterize the property and divide it under California law.

A witness is one who has personal knowledge (other than an expert witness) of the facts which are to be presented to the court. The court cannot determine what, if any, of what Mr. Berniker is testifying to is of his personal knowledge and what is made up or hearsay testimony. When Movant files a new motion, she may need to find a witness who can competently testify in this court.

The Movant has provided the court with a state court minute order and the Debtor's Chapter 13 Plan. The Declaration fails to authenticate the state court minute order, having it just appear in this court's file.

#### **DISCUSSION**

The Debtor commenced this bankruptcy case on July 20, 2012. On April 15, 2013, the court filed the order confirming the Chapter 13 Plan in this case. Order, Dckt. 155. The Original and Amended Master Mailing Lists filed by the Debtor do not include Movant. Dckts. 8, 37. A Spousal Waiver of Right to Claim Exemptions was filed on September 11, 2012. It is signed by Annie M. Hollis. Dckt. 36. Movant is not listed on the certificates of service for the motion to confirm the plan. Dckts. 138, 139.

First, the court has not been presented with credible evidence in support of the Motion. Merely because counsel was hired by Movant, that does not make counsel a competent, credible witness for hire.

Second, the Motion is not clear in the basis for and the relief to be granted by the court. The grounds which have been stated with particularity in the Motion (FRBP 9013) are:

- A. Movant was the spouse of the Debtor.
- B. Movant is the owner of community property identified as the 7624 Tierra Arbor Property with the Debtor.
- C. The Debtor has been receiving a reverse mortgage [though not stated it appears to be a reference to receiving monthly payments on a reverse mortgage which is secured by the Tierra Arbor Property]. Movant is not receiving any portion of the reverse mortgage payments.

**September 17, 2013 at 1:30 p.m.**

- D. The Debtor also receives a \$1,047 pension payment a month, of which Movant receives no portion. Movant asserts that the monthly pension payment is community property.
- E. Debtor has "been in the reverse mortgage since 2009," and Movant asserts that "there is no monthly contract installment to be paid." Therefore, the property is not necessary for an effective reorganization. [On this contention, the court cannot determine if Movant asserts that there are no mortgage payments or no reverse mortgage payments. If the latter, it appears to contradict the allegations that the Debtor has been receiving reverse mortgage payments. Further, the court cannot divine how the existence or non-existence of the payments, in and of themselves, make the property not necessary for an effective reorganization.]

Thereon, Movant requests relief from the stay as that she may,

- A. "Take measures necessary to protect her community interest in the 7624 Tierra Arbor Property, reverse mortgage, and Debtor's pension." These non-specific acts are stated to income the state court dividing the community property [indicating that she want's the state court to exercise control over property of the bankruptcy estate] between the Debtor and Movant.
- B. The Movant brings the motion pursuant to Bankruptcy Rule 112(2)(D) of the United States Bankruptcy Court for the Central District of California. It then states that a formal response must be filed with the court not less than five days before the hearing.

As is obvious, this is not the Bankruptcy Court for the Central District of California and the local rules of that court are not the local rules in this court. The statement in the motion is incorrect as to how opposition may be presented to this motion filed pursuant to Local Bankruptcy Rule 9014-1(f)(2).

The Motion fails to state grounds upon which the court can grant relief. At best, it says that the Debtor's estate includes community property and Movant wants to take the community property out of the bankruptcy estate. Merely wanting to do so is not grounds for relief.

The Debtor provided his declaration in support of the motion to confirm the Chapter 13 Plan. Declaration, Dckt. 137. In it he testifies that he does not have a mortgage payment, with the "mortgage" on his property securing a Reverse Mortgage in the amount of \$144,991.00 to MetLife Home Loans. The Debtor uses the same curious language as counsel, stating that he has "been in the Reverse Mortgage contract since June 2009."

Under the confirmed plan the Debtor is paying \$150.00 a month to the Trustee. That money is used to pay the Class 2 Claim of Golden 1 Credit Union for its claim secured by a vehicle (\$57.90 a month). The Debtor has surrendered the 10124 Shuler Ranch Property as a Class 3 Claim. No other claims, other than a Class 7 unsecured dividend, are to be paid.

Under the Plan the Debtor seeks to "lien strip" a second deed of trust held by OneWest Bank. Though not stated in the Plan, the OneWest Proof of Claim identifies its collateral as the 7624 Tierra Arbor Way Property. Proof of Claim No. 2. The Note attached to the Proof of Claim lists only the Debtor as the borrower. The Deed of Trust attached to the Proof of Claim identifies the Debtor as a married man who is granting the deed of trust on his separate property.

If as contended by Plaintiff the 7624 Tierra Arbor Property is community property, it is property of the bankruptcy estate. 11 U.S.C. § 541(a)(2). This is all of the community property, not only a debtor's partial interest in the property. The federal court has exclusive jurisdiction over property of the bankruptcy estate. 28 U.S.C. § 1334(e)(1). Before the federal court cedes control over property of the estate to another court, the movant must show good, proper, and necessary grounds, and that the non-bankruptcy court exercising its jurisdiction will not interfere with the prosecution of the bankruptcy case.

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 for Relief from the Automatic Stay is denied without prejudice.