

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher M. Klein
Chief Bankruptcy Judge
Sacramento, California

September 30, 2014 at 1:30 p.m.

1. [14-23313](#)-C-13 PAUL/LYNDA FANFELLE CONTINUED MOTION FOR RELIEF
ANF-2 Peter G. Macaluso FROM AUTOMATIC STAY
7-21-14 [[31](#)]
PAWNEE LEASING CORPORATION
VS.

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.

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)(iii).

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, parties requesting special notice, and Office of the United States Trustee on July 21, 2014. Fourteen days' notice is required. That requirement was met.

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). 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.

The Motion for Relief From the Automatic Stay is granted.

PRIOR HEARINGS

The court held an initial hearing on the Motion on August 5, 2014. At the hearing, the parties indicated that they were close to reaching terms for providing for this claim through Debtor's plan. The court continued the hearing on the motion to allow for continued negotiations.

At the August 19, 2014 hearing, Debtor and Movant represented that they were nearing a stipulated resolution. The court granted a further continuance per parties' request.

Debtor filed a Supplemental Opposition on September 2, 2014, which is incorporated into the court's current tentative ruling.

A continued hearing was held on September 9, 2014. During that hearing, the parties requested a continuance to complete settlement negotiations or to determine that no settlement was possible. The court granted a continuance to September 30, 2014.

Nothing new was uploaded to the court's docket.

DISCUSSION AND RULING

Pawnee Leasing Corporation seeks relief from the automatic stay with respect to the personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet. The moving party is seeking to exercise its lawful rights and remedies under the written Lease Agreement entered into with Debtors. Movant provides the Declaration of Sandi Carr to introduce evidence (Dkt. 33).

The Carr Declaration states that on September 16, 2013, Innovative Capital Corp., as Lessor, entered into a Lease Agreement with Crazy for Yogurt Inc. Pursuant to the terms of the Lease Agreement, Innovative Capital Corp. Leased to Crazy for Yogurt a Soft Serve Freezer and 87" Dipping Cabinet. On September 16, 2013, Debtors executed a Guaranty whereby they guaranteed payment by Crazy for Yogurt of all sums to be paid under the terms of the Lease Agreement (Exh. 1), together with costs and attorneys' fees incurred in the collection and enforcement of the Guaranty. (Exh. 2).

Prior to Debtors filing for bankruptcy protection, Innovative Capital Corp. assigned its Lease Agreement to Movant, Pawnee Leasing Corporation. The Assignment is attached as Exh. 3 to Movant's Motion. Movant filed a UCC-1 Filing Statement on the personal property with the California Secretary of State's office (Exh. 4).

The Lease Agreement provides that if the Lessee defaults in the performance of any of its obligations, the Movant may repossess the personal property. Movant alleges that Debtors and Lessee failed to pay the pre-petition March 1, 2014 payment and post-petition April-June 2014 payments. In total, the amount due to cure the default is \$4,535.72. The total balance due under the terms of the Lease Agreement is \$35,968.08.

The declaration offered by Pawnee Leasing Corporation states that it is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and believe [sic]." This could be read two ways. The first is that "whatever I have said is true, to the extent that I have any knowledge about what I am talking about." The second interpretation is

that "I am telling you the truth to the best of my ability to testify in this proceeding."

Movant has provided the court with Exhibits demonstrating the leasing and guaranty relationships. Exhibit 1 to the deficient declaration is the Lease Agreement executed between Innovative Capital Corp. and Crazy For Yogurt, Inc. The Lease Agreement is signed by Lynda Fanfelle as "President" of Lessee and dated September 16, 2013. Exhibit 2 to the declaration is the Guaranty executed by Lynda and Paul Fanfelle. The language of the Guaranty provides that the "Guarantor(s) now hereby individually, jointly and severally, absolutely and unconditionally guaranty to the Lessor (and any person or firm the Lessor may transfer its interest to) all payments and other obligations owed by the Lessee to the Lessor under the Lease"

The Assignment of Lease is Exhibit 3 and demonstrates a transfer of interest from Innovative Capital Corp. to Pawnee Leasing Corporation concerning the Crazy For Yogurt, Inc. lease.

Debtors' Opposition

Debtors argue that no cause exists for the relief requested. Debtors argue that the reason Movant has not been paid is because Movant has not filed a proof of claim and Trustee cannot disburse payments to Movant without a proof of claim on file.

Further, Debtor argues that the contract relationship between Debtor and Movant is not a "pure" lease and that Debtors have a beneficial interest in paying the claim in Class 2 of their plan. Debtors propose making an adequate protection payment of \$380.00 per month.

Debtors' Supplemental Opposition

Debtors reiterate that no cause exists for the requested relief. Debtors assert that their counsel prepared a stipulation that was circulated to and rejected by movant. Debtors state that they filed an amended plan providing for payments in full with a payment of no less than \$906.27 per month to movant as a class 2(a) claim.

Discussion

11 U.S.C. § 362(a)(6) provides that the filing of a petition under section 301, 302, or 303 of the Code operates as a stay of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. A "claim" consists of a right to payment, whether or not it is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. 11 U.S.C. § 105(5)(A). Here, Movant is seeking to enforce a claim against the Debtors in their role as guarantors under the lease agreement. The claim became fixed in nature when the lessees failed to make the March 1, 2014 pre-petition payment under the lease, triggering the guarantor's responsibility under the Equipment Lease Guaranty, guaranteeing all payments owed by the lessee to the lessor under the lease (Exh. 2, Dkt. 33).

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 as guarantors under the lease. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

A copy of the lease is hidden behind a declaration. Local Bankruptcy Rule 9006-1 and the Revised Guidelines for Preparation of Documents requires that the motion, points and authorities, each declaration, and the exhibit document (all exhibits being included in one document) be filed as separate documents. While Debtors argue that this is not a pure lease, they provide no legal arguments or evidence as to why it is an impure lease. Additionally, Debtors do not provide legal argument or evidence as to why they can assert the rights to the equipment under the lease when the Lessee on the contract is Crazy for Yogurt, Inc. Exhibit 1, Dckt. 33.

For purposes of this Motion, the court has been presented with a Lease Agreement and Movant maintains all ownership interest in the personal property, Debtors, as Guarantors under the Lease, have no equity interest in the subject collateral. The Lessee, and Debtors as Guarantors, have not maintained payments under the terms of the Lease Agreement and Guaranty and the court finds sufficient cause to grant the Motion for Relief from the Automatic Stay.

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 Pawnee Leasing Corporation, 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 personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet.

No other or additional relief is granted.

2. [14-22318](#)-C-13 AUDREY LYTLE
MMW-4 Melissa D. Polk

MOTION FOR RELIEF FROM
AUTOMATIC STAY
9-4-14 [[59](#)]

THE BLUE SKY FUND, LLC VS.

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.

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)(iii).

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, parties requesting special notice, and Office of the United States Trustee on September 4, 2014. Fourteen days' notice is required. That requirement was met.

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). 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.

The Motion for Relief From the Automatic Stay is continued to November 4, 2014 at 2:00 p.m.

The Blue Sky Fund, LLC seeks relief from the automatic stay with respect to the real property commonly known as 4621 Windsong Street, Sacramento, California. The moving party has provided the Declaration of Chris Williams to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Williams Declaration states that the Debtor has not made 6 post-petition payments. The loan matured on September 1, 2013, making the amount owing of \$245,312.06 immediately due. with a total of \$ in post-petition payments past due. A Notice of Default was recorded on April 26, 2013 and a

Notice of Sale was published on September 5, 2013. 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 \$563,045.06 (including \$245,312.06 secured by movant's second trust deed), as stated in the Williams Declaration, while the value of the property is determined to be \$365,000, as stated in the court's order on Debtor's Motion to Value (Dckt. 58).

CHAPTER 13 TRUSTEE RESPONSE

The Trustee notes that Debtor's plan, filed March 13, 2014, provides for Creditor's second deed of trust as a Class 2 claim reduced to \$0.00 based on the value of the collateral. As a result of a Motion to Value collateral, the Creditor's secured claim was reduced to \$47,267.00. The property was valued at \$365,000 and the senior lien totals \$317,733.

Debtor's plan was not confirmed and Amended Plan has not been filed.

DEBTOR'S OPPOSITION

Debtor argues that she filed an objection to Creditor's proof of claim on September 17, 2014. She requests that the Motion be denied pending the outcome of the Objection, the hearing for which is set for November 4, 2014.

The Objection to the Blue Sky Fund's Claim are summarized as follows:

- A. The Proof of Claim includes costs and fees accrued after the commencement of the bankruptcy case. The objection seeks to have these removed from the pre-petition claim (and presumably being advanced as post-petition defaults) and that justification be provided for the costs and fees.
- B. Attorneys' fees of \$9,201.30 were included in the first Proof of Claim filed by this Creditor, with the amount doubling to \$18,864.61 the amended proof of claim. No accounting for such fees as been provided.
- C. Payoff fees are not explained in the Proof of Claim.
- D. No evidence to support a principal balance of \$224,490.60 has been provided by Creditor.
- E. Interest in the amount of \$8,070.75 is incorrectly computed.

Objection to Claim No 4-2, Dckt. 72. The objection does not state what Debtor asserts is the accurate claim amount.

Debtor asserts that she has not filed an Amended Plan because she is disputing the amount of pre-petition costs and fees listed in Creditor's proof of claim.

CREDITOR'S RESPONSE

Creditor argues that Debtor's response is a "stall tactic" and

should not prevent the court from ruling on the Motion for Relief. Creditor argues that Debtor previously admitted the validity and amount of it's secured claim based on statement made in her Motion to Value. Debtor's statements included an assertion that the present balance owed to Creditor is \$245,312.06, a figure drawn from Creditor's proof of claim that included more than \$21,000 in pre-petition interest, late charges, legal fees and foreclosure fees. Debtor did not object to the proof of claim.

DISCUSSION

The court's decision is to continue the hearing on the Motion for Relief from Stay to November 4, 2014 to be heard in conjunction with Debtor's Objection to Claim of Creditor.

The court recognizes Creditor's response to Debtor's opposition as a response to the Objection to the Proof of Claim and will take up the argument at the hearing on the Objection in November. The court has determined that this Creditor has a secured claim in the amount of \$47,267.00. Order, Dckt. 58.

This bankruptcy case was filed on March 7, 2014. There remain fifty-four (54) months for this Debtor for a maximum sixty (60) month plan. Paying the secured claim of \$47,267.00 at an estimated 3.75% interest (the court makes no determination on what the appropriate interest rate, if any, must be included in the Plan for this secured claim) over 54 months requires a monthly payment to this Creditor of \$875.00.

As a condition of the continuance, the Debtor shall pay to the Chapter 13 Trustee \$875.00, each, for October and November adequate protection payments by October 3, 2014, and October 25, 2014, plus an additional \$52.50 with each payment for the estimated Chapter 13 Trustee's fees for the disbursement computed at an estimated six percent (6%). The Chapter 13 Trustee shall make a special disbursement on or before October 10, 2014, to Creditor for the October 2014 adequate protection payment, and disburse the November 2014 adequate protection when making the normal distributions for plan payments made by October 25, 2014. The adequate protection payment shall be applied to the secured claim as previously determined by the court, and if the case is dismissed, to interest on the claim which has accrued since the commencement of this case.

If either adequate protection payment, including the Trustee's Fees, are not timely made, the Trustee shall file a Statement of Non-Payment with the court and serve Debtor, Debtor's Counsel, and Creditor's Counsel. If the adequate protection payment is not made to the Trustee, the creditor may have this motion reset for the first available regular Chapter 13 Relief From Stay Calendar, providing the Chapter 13 Trustee, Debtor, and Debtor's counsel with at least seven calendar days notice of the reset hearing date. Creditor may request the court to accelerate the hearing date by ex parte motion.

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 Stay is continued to November 4, 2014 at 2:00 p.m.

IT IS FURTHER ORDERED that as condition of the continuance, the Audrey Lytle D. Polk, the Debtor, ("Debtor") shall pay to the Chapter 13 Trustee \$875.00, each, for October and November adequate protection payments by October 3, 2014, and October 25, 2014, plus an additional \$52.50 with each payment for the estimated Chapter 13 Trustee's fees for the disbursement computed at an estimated six percent (6%). The Chapter 13 Trustee shall make a special disbursement on or before October 10, 2014, to The Blue Sky Fund, LLC ("Creditor") for an October 2014 adequate protection payment and a November 2014 adequate protection when making the normal distributions for plan payments made by October 25, 2014. The adequate protection payment shall be applied to the secured claim as previously determined by the court, and if the case is dismissed, to interest on the claim which has accrued since the commencement of this case.

IT IS FURTHER ORDERED that if either adequate protection payment, including the Trustee's Fees, are not timely made, the Trustee shall, within one business day of the payment not being timely made by Debtor, file a Statement of Non-Payment with the court and serve Debtor, Debtor's Counsel, and Creditor's Counsel. If the adequate protection payment is not made to the Trustee, the creditor may have this motion reset for the first available regular Chapter 13 Relief From Stay Calendar, providing the Chapter 13 Trustee, Debtor, and Debtor's counsel with at least seven calendar days notice of the reset hearing date. Creditor may request the court to accelerate the hearing date by ex parte motion.

3. [14-27492](#)-C-13 RONALD NEALY-SWIFT
MDE-1 James L. Keenan

MOTION FOR RELIEF FROM
AUTOMATIC STAY
8-27-14 [[20](#)]

ONEWEST BANK N.A. VS.

Final Ruling: No appearance at the September 30, 2014 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 Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 27, 2014. Twenty-eight 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.

OneWest Bank N.A. seeks relief from the automatic stay with respect to the real property commonly known as 17641 Arlington Place, Tehachapi, California. The moving party has provided the Declaration of Victoria Frausto to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Frausto Declaration states that the Debtor has not made 1 post-petition payments, with a total of \$1,452.99 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 \$391,895.90 (including \$391,895.90 secured by movant's first trust deed), as stated in the Frausto Declaration, while the value of the property is unknown as it was not scheduled by the Debtor and not discussed by Movant.

CHAPTER 13 TRUSTEE

On September 12, 2014, The Chapter 13 Trustee filed a statement of non-opposition to the court granting the requested relief.

DISCUSSION

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).

Movant further argues that it is entitled to an *in-rem* order on the basis that the Debtor's filing of the petition was part of a scheme to hinder, delay, or defraud creditors that involved the transfer of all or part ownership of, or other interest in the property without the knowledge or consent of Movant, as well as multiple bankruptcy cases affecting the property.

In support of its request for *in rem* relief, Movant asserts the following:

1. On April 22, 2014, Gordon and Helene Cruse transferred title to the Property, by Grant Deed, to Debtor. (Exhibit 5). The transfer was made without the knowledge or consent of Movant.
2. On March 28, 2014, Gordon Cruse filed a Chapter 7 bankruptcy petition as Case No. 14-11536 and received a discharge on July 23, 2014.
3. On July 22, 2014, Debtor file the current Chapter 13 bankruptcy petition.

A review of the docket in this case confirms the history detailed by Movant. 11 U.S.C. § 362(d)(4) allows the court to grant relief from stay where the court finds that the petition was filed as part of a scheme to delay, hinder or defraud creditors that involved either (I) transfer of all or part ownership or interest in the property without consent of secured creditors or court approval or (ii) multiple bankruptcy cases affecting the property.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 364(d)(4). Movant has provided sufficient evidence concerning a series of bankruptcy cases being filed with respect to the subject property and transfers involving the property that were intended as part of a scheme to delay, hinder, or defraud Movant with respect to the Property.

The court shall issue a minute order terminating and vacating the automatic stay to allow OneWest Bank N.A., 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.

The moving party has 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 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 OneWest Bank N.A., 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 17641 Arlington Place, Tehachapi, California.

IT IS FURTHER ORDERED that relief is granted pursuant to 11 U.S.C. § 362(d)(4) with this order granting relief from the stay, if recorded in compliance with applicable State laws governing notices of interests or liens in real property, shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except as ordered by the court in any subsequent case filed during that period.

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.