UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

October 21, 2014 at 9:31 A.M.

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1. 14-26240-B-11 MWP-2 — FOLSOM LEARNING CENTER ASSOCIATES — MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY 9-23-14 [47]

HOMESTEAD MORTGAGE INCOME FUND, LLC VS.

Tentative Ruling: The debtor's opposition is overruled. The motion is granted in part and dismissed in part. As to the debtor-in-possession and the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362(d)(2) in order to permit the movant to foreclose on the real property located at 791 Levy Road, Folsom, California (APN 071-0370-035-0000)(the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The movant's request for a finding under 11 U.S.C. § 362(d)(4) that the filing of the bankruptcy case was part of a scheme to delay hinder and defraud creditors is denied. The 14-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Relief from the automatic stay under 11 U.S.C. § 362(d)(2) is appropriate if the debtor does not have an equity in the property subject to the automatic stay and if the property is not necessary to an effective reorganization. The debtor and the movant dispute the value of the Property in this case, but whether the value of the Property is the $1,178,000.00 value ascribed by the debtor in the debtor's sworn Schedules or the $1,640,000.00 value set forth in an appraisal of the Property obtained by the movant, the debtor does not have an equity in the Property once the $991,000.00 SBA loan in favor of Key Bank and secured by the second priority deed of trust encumbering the Property is taken into account. Together, the movant's $1,503,661.15 first priority loan and Key Bank's $991,000.00 loan total $2,494,661.15. See Stewart v. Gurley, 745 F.2d 1194, 1195 (9th Cir. 1984)("'equity' refers to the difference between the value of the property and all encumbrances upon it")(emphasis added). The court finds that movant has satisfied its burden under 11 U.S.C. § 362(g) to show absence of equity. The debtor's claims in the opposition that the balance on the loan asserted by the movant is "suspect" is not supported by evidence and not persuasive.

The court also does not find persuasive the debtor's objection to the supporting declaration of Vivian Prieto, an employee of the servicer of the loan obligation owed to the movant. The debtor asserts that Ms. Prieto has "drawn conclusions and made statements without reviewing the documents nor the financial records of FCI," but Ms. Prieto's declaration

clearly states at lines 9-10 on page 2 that the statements in her declaration are based on the movant's loan files, of which she is a custodian.

Once lack of equity is established, the burden is on the debtor to show that the property in question is necessary to an effective reorganization. 11 U.S.C. § 362(g). "What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means...that there must be 'a reasonable possibility of a successful reorganization within a reasonable time.'" United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375-376, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988).

The debtor has not satisfied the foregoing standard. The debtor asserts in its opposition and supplement that its tenant, an entity which operates a private school business, is negotiating for the sale of the business which would "stabilize the rental income to the debtor, significantly, increase the value of the real estate and allow it to market the property to this company or another investor." This assertion is not supported by sufficient evidence. The letter filed from Nobel Learning Communities, Inc. ("Nobel") filed by the debtor merely states that Nobel is "considering the possible acquisition" of the tenant business. It does not indicate any active negotiation, nor is it evidence that a sale of the tenant business will have the effects on rental income or real estate value asserted by the debtor.

As to the movant's request for a finding under 11 U.S.C. § 362(d)(4), the request is denied because the movant offers nothing more than the fact of multiple filings by the debtor as evidence of a scheme to delay, hinder and defraud creditors. The court does not consider multiple filings alone to constitute evidence of a scheme to delay, hinder and defraud. See Downey Savings and Loan Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1497 (9th Cir. 1987). It is not incumbent on the court to comb through the records of the debtor's and co-borrower's prior cases to find additional facts to support the movant's requested finding.

The court will issue a minute order.

2.	14-26562-B-7 MPP-1	ANTHONY NOONIS AND CINDY GARCIA-NOONIS	MOTION FOR RELIEF FROM AUTOMATIC STAY 9-17-14 [27]

TLC MANAGEMENT CARE, LLC, ET AL. VS.

Tentative Ruling: The oppositions filed by the debtors, Theresa and Mark Tavianini (the "Tavianinis") and the chapter 7 trustee are overruled. Pursuant to 11 U.S.C. § 362(d)(1), the automatic stay is modified as against the debtors and the estate to allow the movants to proceed to judgment or settlement in Tavianini, et al. v. TLC Management Care, LLC, et al., Sacramento County Superior Court case number 34-2013-00147480 (the "State Court Action"). The automatic stay is not modified to permit the enforcement of any judgment obtained in the State Court Action. The

fourteen-day stay imposed by Fed. R. Bankr. P. 4001(a)(3) shall not apply to the order granting the motion. Except as so ordered, the motion is denied.

The movants, who are defendants in the State Court Action, seek relief from the automatic stay to file a cross-claim against joint debtor Anthony Noonis (who is also a defendant in the State Court Action) in the State Court Action and to proceed to judgment. The movant and the Tavianinis (who are plaintiffs in the State Court Action) have also filed timely adversary proceedings against Mr. Noonis in this court objecting to the dischargeability of certain debts under 11 U.S.C. § 523(a). The court construes the movants' request as one for modification of the automatic stay to allow the State Court Action to proceed to judgment, thereby establishing issues regarding liability on the claims underlying the movants' nondischargeability action, and then return to this court for a determination of nondischargeability with respect to any judgment obtained in the State Court. The court's view of the movants' request is confirmed by the movants' omnibus reply to the Tavianinis and the chapter 7 trustee.

Therefore, the movants' and the debtors' abstention analysis with respect to this matter is inapposite. Abstention is not at issue here, as the claims for determination of nondischargeability alleged in the movants' adversary proceeding are not alleged in the State Court Action, and likewise the adversary proceeding does not request a determination of liability on the claims on which the movants' nondischargeability claims are based. The issue is not whether the court should abstain from deciding the adversary proceeding, but whether cause for relief from the automatic stay exists to allow the State Court Action to proceed to judgment or settlement. "Adequate protection" is not implicated here; lack of adequate protection is only one example of cause for which the automatic stay may be modified. "Cause" has no clear definition and is determined on a case-by-case basis, In re MacDonald, 755 F.2d 715, 717 (9th Cir.1985).

With respect to motions for relief from the automatic stay to permit state court proceedings to continue, the Ninth Circuit Bankruptcy Appellate Panel in In re Kronemyer, 405 B.R. 915 (9th Cir. BAP 2009) stated:

> Among factors appropriate to consider in determining whether relief from the automatic stay should be granted to allow state court proceedings to continue are considerations of judicial economy and the expertise of the state court, see MacDonald v. MacDonald (In re MacDonald), 755 F.2d 715, 717 (9th Cir.1985), as well as prejudice to the parties and whether exclusively bankruptcy issues are involved, see Ozai v. Tabuena (In re Ozai), 34 B.R. 764, 766 (9th Cir.BAP 1983).

Kronemyer, 405 B.R. at 920. The Kronemyer court also stated that it was also appropriate for a bankruptcy court to consider the twelve nonexclusive factors set forth in In re Curtis, 40 B.R. 795 (Bankr. D. Utah 1984). Those factors include the whether the relief will result in a partial or complete resolution of the issues; the lack of any connection with or interference with the bankruptcy case; whether the foreign proceeding involves the debtor as a fiduciary; whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases; whether

the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question; whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties; whether the judgment claim arising from the foreign action is subject to equitable subordination under 11 U.S.C. § 510(c); whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f); the interest of judicial economy and the expeditious and economical determination of litigation for the parties; whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and the impact of the stay on the parties and the "balance of hurt."

Applying the factors described above to the present facts, the court finds cause for modifying the automatic stay. Specifically, the court finds that the fact that the State Court Action has been pending for over one year, the presence of seven non-debtor parties in the State Court Action (five of which are non-debtor defendants) and the greater expertise of the state court in resolving the purely state law matters of liability alleged in the State Court Action weigh heavily in favor of the modifying the automatic stay. In addition, because the underlying state law claims are non-core "related to" matters would only be before the court by way of supplemental jurisdiction under pursuant to 28 U.S.C. § 1367(a), the court would lack constitutional authority to make a final determination of those claims. See Stern v. Marshall, 546 U.S. 2 (2011). Resolving the claims alleged in the State Court Action in this court would necessitate a report and recommendation to the District Court, adding another layer of procedural complexity to resolution of the claims in this court. Finally, although the trustee states in his opposition that the bankruptcy estate may have claims against the movants which may require a response by the estate in the State Court Action, the trustee's mere suggestion of the possibility of such claims and the lack of evidence of harm to the estate or its administration if the State Court Action is allowed to proceed renders the trustee's opposition unavailing.

The court will issue a minute order.

3. 14-28767-B-7 MICHAEL BESOYAN — CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
GMS-1 — 9-4-14 [11]

GLORIA MARTINEZ-SENFTER VS.

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

4. 14-29394-B-7 KENNETH LOMAN
SMR-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-23-14 [10]

JAMES ROMAS VS.

Tentative Ruling: The debtor's opposition is overruled. The motion is granted in part, and the automatic stay is modified as against the debtor and the estate pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2) in order to permit the movant to proceed with an unlawful detainer action against the debtor so that it may exercise its rights under applicable non-bankruptcy law in obtaining possession of the real property located at 1011 26th Street, Apartment A, Sacramento, California 95816 (the "Property"). The 14-day period specified in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

The movant alleges, and the debtor does not dispute or even address in his opposition, that the debtor is in default of an oral month-to-month lease agreement in the total amount of $4,999.96. The movant further alleges and provides evidence that a three day notice to pay rent or surrender possession was served on the debtor pre-petition on June 25, 2014, and that the debtor did not cure the default. Service of the three day notice and expiration of the time to cure terminated the lease. Cal. Civ. Code § 1951.2; 7 Miller & Starr, California Real Estate § 19:201 (3d Ed. 2004). As such, neither the debtor nor the estate has any equity in the Property, and it is not necessary for an effective reorganization in this chapter 7 case. These facts constitute cause for relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2).

The debtor's opposition is unavailing. As the movant asserts in its reply, the debtor alleges no facts in his opposition which refute the facts that (1) he defaulted under the terms of his lease agreement, and (2) he failed to cure the default within the time allowed under the three day notice to pay or surrender possession.

The court will issue a minute order.