

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 5, 2013 at 1:30 p.m.

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1. [13-25332](#)-E-13 TIMOTHY/TRACI SHIELDS MOTION FOR RELIEF FROM
PD-1 Douglas B. Jacobs AUTOMATIC STAY
10-2-13 [[73](#)]
FEDERAL NATIONAL MORTGAGE
ASSOCIATION 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 Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 2, 2013. By the court's calculation, 34 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.

Federal National Mortgage Association ("Seterus") seeks relief from the automatic stay with respect to the real property commonly known as 234 Lassen Street, Chester, California. The moving party has provided the Declaration of Jacob Shue to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Shue Declaration states that the Debtor has not made 5 post-petition payments, with a total of \$5,632.25 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 \$174,655.45 (including \$168,255.45 secured by movant's first trust deed), as

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stated in the Shue Declaration, while the value of the property is determined to be \$80,000.00, as stated in Schedules A and D filed by Debtor.

The Chapter 13 Trustee filed a non-opposition statement to the Motion to Relief from Automatic Stay.

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).

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 Federal National Mortgage Association, 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 Federal National Mortgage Association, 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 234 Lassen Street, Chester, California.

No other or additional relief is granted.

2. [13-21889](#)-E-13 RAY MENO
ND-5 Pro Se

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-11-13 [[51](#)]

PROVIDENT FUNDING
ASSOCIATES, LP VS.
CASE DISMISSED 3/22/13

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, and Office of the United States Trustee on October 11, 2013. By the court's calculation, 25 days' notice was provided. 14 days' notice is required. Movant incorrectly states that written opposition is required.

Tentative Ruling: The Motion to Annul 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 to Annul 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:

Provident Funding Associates, LP, ("Movant") moves the court to annul the automatic stay and to validate trustee's sale with respect to the real property commonly known as 9062 Oasis Avenue, Westminster, California. The moving party has provided the Declaration of Joe Benohn to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Benohn Declaration states that the Debtor failed to make scheduled payments and Movant initiated foreclosure proceedings and engaged the Hopp Law Firm to act as the foreclosure trustee. A Notice of Default was recorded on May 20, 2011. A Trustee's Sale was scheduled for September 19, 2012. Debtor filed bankruptcy on February 13, 2013. Debtor did not notify Movant or its attorney about the bankruptcy. On February 15, 2013, ABM Investments, LLC purchased the subject property at sale and recorded Trustee's Deed Upon Sale on March 27, 2013. On March 22, 2013, Debtor's bankruptcy case was dismissed for failure to file the required schedules.

PRIOR HEARING - 06-11-13

The motion was denied without prejudice because of procedural defects. First, the motion did not state whether and when a written opposition must be filed as well as the deadline for filing and serving the opposition pursuant to Local Bankruptcy Rule 9014-1(d)(3). Second, the motion was missing relief from stay information sheet (Form EDC 3-468) pursuant to Local Bankruptcy Rule 4001-1(a)(3). Third, the motion was set for hearing on an incorrect calendar. It should have been set for hearing on the court's 1:30 p.m. Chapter 13 relief from stay calendar. Fourth, Movant did not file each pleading (e.g., motion, points and authorities, declaration) as a separate electronic pleading pursuant to Local Bankruptcy Rule 9014-1(d)(1). Fifth, pleading title motion was combined with motions and points and authorities. The Movant did not clearly lay out the ground upon which relief is requested. Fed. R. Civ. P. 7(b); Fed. R. Bankr. P. 7007.

PRIOR HEARING - 07-16-13

The motion was denied without prejudice because the motion did not plead with particularity the grounds upon which the requested relief. Fed. R. Civ. P. 7(b); Fed. R. Bankr. P. 9013. The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations.

CONTINUANCE

Subject Matter Jurisdiction Requirement

Section 1334 provides the bankruptcy court with three types of jurisdiction: "arising under title 11 (i.e. under the Bankruptcy Code), "arising in...cases under title 11"; and those "related to cases under title 11." 28 U.S.C § 1334(b); *Aheong v. Mellon Mortgage Co.* ("In re Aheong"), 276 B.R. 233, 243. The bankruptcy court has post-dismissal and post-closing

jurisdiction over Motion to Annul the Stay pursuant to Section 1334's "arising under title 11." *In re Aheong*, 276 B.R. at 245. The Ninth Circuit has also held that the bankruptcy court has a "wide latitude in crafting relief from the automatic stay, including the power to grant retroactive relief from stay." *Id.* at 250.

The Ninth Circuit has also ruled that after dismissal the bankruptcy court has ancillary jurisdiction to "interpret" and "effectuate" its orders. *Tsafaroff v. Taylor (In re Taylor)*, 884 F.2d 478, 481; see also *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379-380, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994). This includes "interpreting" and "effectuating" its prior order to retroactively lift the automatic stay in a dismissed bankruptcy case. *In re Aheong*, 276 B.R. at 239-40 (Bankruptcy court interpreted and effectuated General Order No. 1 when it granted Motion to Annul the Stay. This grant was not independent of General Order No. 1 so it was not "new relief" after dismissal.). However, bankruptcy court is prohibited from granting "new relief independent of its prior rulings." *Id.* at 240.

Annulment Standard

The Court uses "balancing of the equities" test to determine cause to retroactively annul the automatic stay. *Fjeldsted v. Lien (In re Fjeldsted)*, 293 B.R. 12, 24.

In "balancing of the equities," the court has considered the following factors: Debtor's failure to notify the Creditors of the bankruptcy proceedings (*In re Aheong*, 276 B.R. at 251), Debtor's act of filing late petitions to cause delay (*In re Aheong*, 276 B.R. at 251), whether the Creditor acted nonchalantly and continuously violated the stay (*National Env'tl. Waste Corp. v. City of Riverside (In re National Env'tl. Waste Corp.)*, 129 F.3d 1052, 1055).

Where "the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors[,] there may be cause to annul the stay. *In re Aheong*, 276 B.R. at 250; *In re Murray*, 193 B.R. 20, 22 (Bankr.E.D.Cal. 1996).

Discussion

Movant cites sufficient facts and legal authority to support its argument that the bankruptcy court has subject matter jurisdiction and it should use the "balancing equities" tests to grant a retroactive annulment. However, Movant does not perform a thorough analysis of the factual allegations and the law to support its argument for annulment. Nevertheless there is sufficient ground for relief.

After Debtor failed to make scheduled payments, Movant recorded Notice of Default on May 20, 2011 and proceeded with the Trustee's sale that was originally scheduled for September 19, 2012. Debtor failed to fulfill its duty and notify Movant that it had filed for bankruptcy on February 13, 2013. Movant, in good faith and without knowledge of the bankruptcy, conducted the Trustee's Sale and sold the property on February 15, 2013. This resulted in unintentional violation of the automatic stay. While the Debtor filed the bankruptcy, he did not go forward with it. On March 22, 2013, Debtor's bankruptcy case was dismissed for Debtor's failure to file the required schedules.

Given that there is a recorded default notice against the property, bankruptcy case was dismissed, and Movant had no knowledge of the bankruptcy proceeding, it would not unjustly harm the Debtor to retroactively annul the stay. In fact, Movant will be harmed if the stay remains in place because Movant will have to bear the cost of a second foreclosure sale. Therefore, under the "balancing of the equities" test, the automatic stay is annulled.

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 to Annul 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 annulled, effective as of the February 13, 2013 commencement of this bankruptcy case and all times thereafter, to allow Provident Funding Associates, LP, 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 allow the purchaser at any such sale obtain possession of the real property commonly known as 9062 Oasis Avenue, Westminster, California.

No other or additional relief is granted.

3. [13-91405-E-7](#) **MARCUS/CATANYA JONES**
RJA-4 **Robert J. Anaya**

**CONTINUED MOTION TO COMPEL
ABANDONMENT O.S.T.
10-7-13 [[24](#)]**

CONT. FROM 10-31-13 (MODESTO)

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and Office of the United States Trustee on October 17, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment 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 to Compel Abandonment 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:

PRIOR HEARING

Debtors seek an order compelling abandonment of the estate's interest of Debtor's business and business assets.

However, the declaration offered by the Movant states that it is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and belief." 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."

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration,

verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief. Counsel is advised that his firm should update its declaration forms to be in unqualified compliance with § 1746 as the next time this court, or other judges sitting in this District may well find the declaration to be insufficient and deny the motion without prejudice and without a hearing.

The motion also fails to describe the personal property sought to be abandoned. The court does not have sufficient information regarding the property to be abandoned. In the Debtor's Motion to Compel Abandonment, the Debtor referred to the property as "tools of the trade, equipment, accounts receivable and other business-related assets." For the court to grant this motion, the Debtor needs to specify what business assets are being abandoned. For instance, the business name, specific business accounts, office supplies, office hardware (laptop, computer, printer), and office furniture (chairs, tables, industrial lights). This court will not issue vague orders.

CONTINUANCE

The court continued the hearing to allow the Debtors to file a supplemental pleading to specifically identify the property to be abandoned. Given the nature of the personal property, a tow truck and equipment that the Debtors are using for their business, the court will accept the existing declaration as being based on personal knowledge under penalty of perjury.

The Property to be abandoned is described in the Supplemental Pleading and Declaration, Dckts. 36, 37,

- A. 2000 Freightliner flatbed tow truck (in excess of 700,000 miles per the odometer), VIN# 1 FV3GFBC5YHG19233, with painted business name decal "Doc's Towing/Repair Broker",

together with used Cobra CB radio; associated winches/chains/tie-down straps; auxiliary towing lights; miscellaneous basic hand tools kept on the tow truck with used tool box, together with hand wrenches, screwdrivers, etc., plus lug wrenches and wood chock-blocks; all valued by Debtors in its Schedules at \$20,000;

- B. Business license and goodwill of the business name "Doc's Towing/Repair Broker" (no paid advertising of any kind; word-of-mouth referrals only), all valued by Debtors at \$0.00;
- C. Cash on hand/Accounts Receivable valued by Debtors in its Schedules at \$0.00;
- D. Used Hewlett Packard computer, keyboard, fax machine, valued by Debtors in Schedules at \$50.00 (correct amount).

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. Cf. *Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion is granted, the personal property being of insignificant value to, and a burden on the estate.

A minute order substantially in the following form shall be prepared and issued by the court:

The Motion to Abandon Property filed by the Debtors 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 to Compel Abandonment is granted and that the real and personal property identified as:

- A. 2000 Freightliner flatbed tow truck (in excess of 700,000 miles per the odometer), VIN# 1 FV3GFBC5YHG19233, with painted business name decal "Doc's Towing/Repair Broker", together with used Cobra CB radio; associated winches/chains/tie-down straps; auxiliary towing lights; miscellaneous basic hand tools kept on the tow truck with used tool box, together with hand wrenches, screwdrivers, etc., plus lug wrenches and wood chock-blocks;
- B. Business license and goodwill of the business name "Doc's Towing/Repair Broker" (no paid advertising of any kind; word-of-mouth referrals only), all valued by Debtors at \$0.00;

- C. Cash on hand/Accounts Receivable valued by Debtors in its Schedules at \$0.00;
- D. Used Hewlitt Packard computer, keyboard, fax machine, valued by Debtors in Schedules at \$50.00.

listed on Debtor's Schedules B and C are abandoned to the Debtors, Marcus and Catanya Jones, by this order, with no further act of the Trustee required.