

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 15, 2018 at 10:30 a.m.

1. [16-25321-E-7](#) JAY COHEN CONTINUED MOTION FOR RELIEF
[CJO-1](#) Steele Lanphier FROM AUTOMATIC STAY
3-19-18 [133]

U.S. BANK TRUST, N.A. 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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on March 19, 2018. By the court's calculation, 31 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 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 Automatic Stay is granted.

U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust by Caliber Home Loans, Inc., as attorney in fact (“Movant”) seeks relief from the automatic stay with respect to Jay Cohen’s (“Debtor”) real property commonly known as 9029 Boise Court, Sacramento, California (“Property”). Movant has provided the Declaration of Melba Arredondo to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Arredondo Declaration states that there are eighteen post-petition defaults in the payments on the obligation secured by the Property, with a total of \$33,239.16 in post-petition payments past due. The Declaration also provides evidence that there are five pre-petition payments in default, with a pre-petition arrearage of \$9,233.10.

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 \$289,671.03 secured by Movant’s first deed of trust, as stated in the Arredondo Declaration and Schedule D. The value of the Property is determined to be \$350,000.00, as stated in Amended Schedule A. Dckt. 185. When the Motion was filed, Movant relied upon the current assertion of value, which was \$210,000.00. Dckt. 1.

Movant’s Fourth Amended Schedule C (Dckt. 185) filed on July 2, 2018, asserts an exemption of \$86,046.00 in the Property pursuant to C.C.P. section 704.730^{FN.1.}

FN.1. None of Debtor’s Amended Schedules in this case include a proof of service indicating notice was provided to any party. While a Debtor may amend schedules as a matter of course, Federal Rule of Bankruptcy Procedure 1009(a) requires Debtor provide notice to the Trustee and any entity affected by the amendment.

ORDER CONTINUING HEARING

Pursuant to a joint *ex parte* stipulation between the parties, the court entered an order on April 2, 2018, continuing the hearing to 3:00 p.m. on July 17, 2018. Dckt. 149.

CONTINUANCE OF JULY 17, 2018 HEARING

In related Contested Matters in this case, the court addressed the Debtor’s desire to reconvert the case to Chapter 13 based on changed circumstances. The court also addressed the potential equity in the Property, which Debtor has finally claimed an exemption in and the Chapter 7 Trustee’s apparent inaction based on Debtor seeking to reconvert this case to one under Chapter 13.

In light of the “challenges” manifested by Debtor in claiming exemptions and moving to reconvert this case to one under Chapter 13 and the Trustee’s apparent “confusion” over acting with respect to the equity in the property (in part by Debtor’s delay in claiming the exemption), the court further continued this hearing to avoid all of the parties the potential cost and expense of addressing a Rule 60(b)

motion if the relief is granted, the case reconverted, and the Debtor pursuing a Chapter 13 Plan with his increased income.

TRUSTEE'S OPPOSITION

Chapter 7 Trustee, J. Michael Hopper, filed an Opposition to the Motion on July 19, 2018. Dckt. 189. Trustee's Opposition is supported by the Declaration of Gina Crane, licensed real estate agent and agent for Coldwell Banker Real Estate. Dckt. 190. Trustee asserts the value of the Property is approximately \$360,000.00, therefore having equity which could satisfy other claims on top of Movant's full secured claim. The Trustee notes that Movant previously admitted there was no pre-petition arrearage on the debt shown by U.S. Bank Trust's Proof of Claim No. 13-1 is based. Dckt. 119.

AUGUST 16, HEARING

At the August 16, 2018 hearing, the court continued the hearing to November 15, 2018, again allowing Debtor additional time to reconvert this case to one under Chapter 13 and properly provide for Movant's secured claim.

DISCUSSION

Debtor has not filed a new motion to reconvert this case to one under Chapter 13 since the court denied Debtor's prior Motion (Dckt. 196) on August 17, 2018. Order, Dckt. 212.

Since the filing of Movant's Motion on March 19, 2018, Debtor amended his Schedule C numerous times. On July 2, 2018, Debtor filed his Fourth Amended Schedule C to claim an exemption in the Property in the amount of \$86,046.00. In Debtor's Original and first three Amended Schedules C, no exemption was claimed.

Previously, the court believed that non-exempt equity in the Property may exist. The existence of nonexempt equity prevented Movant from showing good cause for relief because (1) Movant was adequately protected, and (2) the Trustee had already expended resources and taken steps to liquidate the Property in an effort to distribute the nonexempt assets to satisfy other allowed claims.

However, Debtor having Amended Schedule C to claim an exemption over all the Property's remaining equity above and beyond Movant's claim, no hindrance to good cause remains. Debtor has held the Property for nearly two years without making any payments towards Movant's claim or for adequate protection. Debtor's delay is more egregious considering the case history—Debtor's undervaluation of the Property and attempts to reconvert the case to hinder the Trustee's effort's to sell the Property.

Movant has not established that the Property lacks equity. 11 U.S.C. § 362(d)(2). However, Movant has shown good cause for relief, including failure to make pre- and post-petition payments. 11 U.S.C. § 362(d)(1).

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.

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 U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust by Caliber Home Loans, Inc., as attorney in fact (“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 vacated to allow U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust by Caliber Home Loans, Inc., 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 that is recorded against the real property commonly known as 9029 Boise Court, Sacramento, California (“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 to obtain possession of the Property.