

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

November 24, 2015 at 1:30 p.m.

1. [10-24808-E-13](#) AMY HUYNH
DJD-1

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
10-4-15 [[109](#)]

SETERUS, INC. VS.

Final Ruling: No appearance at the November 24, 2015 hearing is required.

Seterus, Inc., as the authorized subservicer for Federal National Mortgage Association, having filed a "Withdrawal of Motion" for the pending Motion for Relief from Automatic Stay, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion for Relief from Automatic Stay, and good cause appearing, **the court dismisses without prejudice the Motion for Relief from Automatic Stay.**

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.

A Motion for Relief from Automatic Stay having been filed by Seterus, Inc., as the authorized subservicer for Federal National Mortgage Association, having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

IT IS ORDERED that the Motion for Relief from Automatic Stay is dismissed without prejudice.

November 24, 2015 at 1:30 p.m.

- Page 1 of 16 -

Tentative Ruling: The Motion to Abandon Property 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 7 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on November 10, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property 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. At the hearing -----
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The Motion to Abandon Property is granted.

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 filed by Aruna and Sawtantra Chopra ("Debtor") requests the court to order the Trustee to abandon two properties:

1. The Note Secured by Deed of Trust dated June 23, 2010, in the principal amount of \$700,000.00, executed by Yosemite Investments, Inc. in favor of the Chopra Sawtantra & Aruna/Chopra family 2004/TR

("Yosemite Note");

2. The Deed of Trust with assignment of rents as additional security dated June 23, 2010, executed by Yosemite Investments, Inc. as Trustor in favor of the Chopra Sawtantra & Aruna/Chopra family 2004/TR as beneficiary; this was recorded on July 5, 2010, in the official records of the Stanislaus County Recorder's Office with respect to the real property commonly known as 6978 Hillcrest Drive, Modesto, California ("Yosemite Deed of Trust").

Dckt. 1411.

The Motion states that the real property commonly known as 6978 Hillcrest Drive, Modesto, California ("Property") was purchased by the Debtor. The Debtor states in 2004, the Debtor transferred the Property into the Chopra Family Trust dated April 27, 2004 ("Trust").

In 2005, the Debtor states that Debtor Aruna Chopra started a corporation named Yosemite Investments, Inc. ("Yosemite"). Yosemite did not have any assets from 2005 through 2010. The Motion states that on June 23, 2010, as part of a real estate deal that Debtor Aruna Chopra was doing, she attempted to transfer the Property from the Trust to Yosemite. However, the Motion argues that the transfer was invalid because the co-trustee and Debtor Sawntantra Chopra did not sign the deed which is required under the Trust.

The Debtor attached a copy of the grant deed between Debtor Aruna Chopra as Trustee of the Trust in favor of Yosemite dated June 22, 2010. Dckt. 1412, Exhibit 2.

The Debtor attached a copy of a Deed of Trust with Assignments of Rents as Additional Security, which was executed by Yosemite as Trustor in favor of the Trust as beneficiary. Dckt. 1412, Exhibit 3.

The Debtor attached a copy of the purported Note secured by Deed of Trust dated June 23, 2010 in the principal amount of \$700,000.00 which states it was executed by Yosemite in favor of the Trust.

The Motion states that although the transaction states that money was paid towards the Property, it was only done so on paper as part of the transaction in contemplation of a real estate investment that was never consummated, and no money was ever paid towards the purported purchase of the Property by Yosemite. The Motion also asserts that there were no payments made under the Yosemite Deed of Trust and that except for a paper transfer, there was no consideration paid for the transfer of the Property.

The Debtor argue that since the real estate deal never went forward, on December 29, 2011, to correct the title issues, there was signed and recorded a grant deed from Yosemite to Debtor Aruna Chopra, only. Dckt. 1412, Exhibit 5. The intent in filing this, according to the Debtor, was to unwind the transaction so that the title would be back in the name of the Trust. The Debtor asserts that it was in error to put Debtor Aruna Chopra's name alone.

The Debtor argues that it was always the intention of Debtor Aruna Chopra that the Yosemite Deed of Trust would merge out and the Yosemite Note and Yosemite Deed of Trust would therefore be of no force and effect.

The Debtor states that on May 1, 2012 the Franchise Tax Board suspended Yosemite again and has remained as a suspended corporation.

On August 29, 2014, the court granted the Motion to Abandon the Property to the Debtor.

In conclusion, the Debtor argues that the Yosemite Deed of Trust and the Yosemite Note should be abandoned because the original deed was invalid, there was no consideration for the original transaction between Debtor and Yosemite, and the Yosemite Deed of Trust was supposed to merge with the Debtor when the Property was deeded to Debtor Aruna Chopra. The Debtor asserts that there is no benefit to any creditor of the Chapter 7 case.

The Declaration of Debtor Aruna Chopra has been filed in support of the motion and values the Property to be \$0.00 due to the reasons stated *supra*.

DISCUSSION

The Motion is premised on the Note and Deed of Trust having no value to the estate. The contentions of no value are based on the conduct of Debtor in executing and recording documents which are purported to be of no legal significance. Debtor states that the underlying property which is subject to the Deed of Trust has been abandoned by the Trustee.

Debtor directs the court to an order authorizing the abandonment of property occurring on August 29, 2014. The court filed an order on August 29, 2014, authorizing the abandonment of the 6978 Hillcrest Drive, Modesto California Property. Dckt. 1031. The motion to abandon was filed by the Chapter 7 Trustee, asserting that the Hillcrest Property was subject to a lien securing a debt of \$383,667.00 owed to the Bank of the West. Motion, Dckt. 934. Further, that the property was subject to an abstract of judgment recorded by Bank of the West to secure a \$2,599.556.43 judgment. The Trustee concluded that the Hillcrest Property was burdensome to the bankruptcy estate.

The court finds that the Yosemite Deed of Trust and Yosemite Noted are of no value and that there are negative financial consequences to the Estate retaining both. The Debtor's extensive Motion outlines the facts that led to the execution of the Yosemite Deed of Trust and Yosemite Note. It is apparent that both the Deed and Note are of no value. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Sawtantra and Aruna Chopra ("Debtor") 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 Property identified as:

1. The Note Secured by Deed of Trust dated June 23, 2010, in the principal amount of \$700,000.00, executed by Yosemite Investments, Inc. in favor of the Chopra Sawtantra & Aruna/Chopra family 2004/TR;
2. The Deed of Trust with assignment of rents as additional security dated June 23, 2010, executed by Yosemite Investments, Inc. as Trustor in favor of the Chopra Sawtantra & Aruna/Chopra family 2004/TR as beneficiary; this was recorded on July 5, 2010, in the official records of the Stanislaus County Recorder's Office with respect to the real property commonly known as 6978 Hillcrest Drive, Modesto, California.

is abandoned to Sawtantra and Aruna Chopra by this order, with no further act of the Trustee required.

3. [15-28161](#)-E-13 FRANK FREEMAN
RDN-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-27-15 [8]

BANK OF NEW YORK MELLON 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 - Hearing Required.

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 October 27, 2015. By the court's calculation, 28 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). 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). 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.

BANK OF NEW YORK MELLON'S MOTION FOR RELIEF FROM STAY

Bank of New York Mellon, fka Bank of New York, as Trustee, in trust for registered holders of CWABS, Inc., Asset-Backed Certificates, Series 2005-IM3 ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 4110 Trotter Drive, Vallejo, California (the "Property"). The moving party has provided the Declaration of Randall Naiman to introduce evidence as a basis for Movant's contention that Frank Freeman ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Movant asserts it purchased the Property at a pre-petition Trustee's Sale on July 9, 2015. Based on the evidence presented, Debtor would be at best tenant at sufferance.

Movant has provided a copy of the recorded Trustee's Deed Upon Sale to

substantiate its claim of ownership. This Deed Upon Sale was not authenticated in the Naiman Declaration. Fed. R. Evid. 901, 902; Dckt. 10. Further, the Naiman Declaration states:

I am the attorney of record for **Deutsche Bank National Trust Company as Trustee on behalf of the Certificateholders of the Morgan Stanley ABS Capital I Inc. Trust 2006-HE6, Mortgage Pass-Through Certificates, Series 2006-HE6.**

Dckt. 10 ¶ 1 (emphasis added).

In looking further into the Naiman declaration, he states the following under penalty of perjury:

- a. He is the attorney Deutsche Bank National Trust Company, as Trustee.
- b. He has personal knowledge upon which he provides his testimony under penalty of perjury.
- c. Bank of New York Mellon, as Trustee, is the Movant seeking relief from the automatic stay with respect to the 410 Trotter Drive Property.
- d. Bank of New York Mellon, Trustee, purchased the 401 Trotter property at a foreclosure sale, directing the court to a certified copy of a trustee's deed filed as Exhibit A.

Declaration, Dckt. 10. The Naiman declaration does nothing more or less that advise the court that a certified copy of a trustee's deed is filed as Exhibit A.

The court has reviewed Exhibit A, which is titled "Trustee's Deed Upon Sale." In the upper right hand corner is recoding information which is identified for Marc C. Tonneson, Assessor/Recorder for Solano County, California. Dckt. 11. The Trustee's Deed contains a notary seal by a Maricopa County, Arizona notary. *Id.* at 4. The Trustee' Deed filed as Exhibit A does not bear any stamps or other demonstration of it having been certified by the Solano County Assessor/Recorder.

DEBTOR'S OPPOSITION

Debtor filed opposition on November 12, 2015. Dckt. 28. Debtor's opposition provides background to the instant motion in relation to its dealings with Bank of America, as the servicer of the Note. Opposition, ¶ 1 Dckt. 28. The Opposition recounts Debtor's contention that there was a loan modification, Bank of America, N.A. refused to comply with the modification, and a Trustee's Sale was conducted under the deed of trust on or about July 9, 2015. Dckt. 29 ¶ 6.

Debtor states that he and filed a motion to consolidate the unlawful detainer action of Movant with Debtor's state court claims based on the asserted modification. The hearing on the motion to consolidate was set to be conducted on November 16, 2015." *Id.*, ¶ 7. Debtor further requests this court deny the 14-day waiver "to protect the status quo if for some reason the Solano Superior Court is unable to reach a decision on Debtor's motion to consolidate and for a stay on enforcement of the unlawful detainer action." Dckt. 28 ¶ 9.

MOVANT'S REPLY

Movant filed a reply on November 16, 2015. Dckt. 31. The grounds for relief that Movant asserts are as follows:

- A. Movant reasserts that the issue as are limited to grounds stated in 11 U.S.C. 362(d);
- B. Counterclaims by the debtor on unrelated issues, such as the underlying contract, are beyond the scope of a relief from stay motion;
- C. Debtor provides no legal or valid basis to oppose the motion for relief from stay;
- D. There is a rebuttable presumption that a foreclosure sale has been conducted regularly and fairly. Cal. Civ. Code §§ 2924-2924(k); *Royal Thrift and Loan Co. v. County Escrow, Inc.*, 123 Cal. App. 4th 24 (2004);
- E. Certified copies of recorded documents are self-authenticating under Federal Rules of Evidence § 902;
- F. Filing an independent civil action in state court is immaterial to a California State Court resolving the state court unlawful detainer action; thus, this court should not be impeded from granting relief from automatic stay on the unlawful detainer action. *Gonzles v. Gem Properties, Inc.*, 37 Cal. App. 3d 1029, 1035 (1974) (citing *Cruse v. Stein*, 146 Cal. App. 2d 688, 689-92 (1956));
- G. Under 11 U.S.C. 362(d)(2), Debtor has no equity and the Property cannot be necessary for Debtor's reorganization because Debtor no longer holds title to the Property as of the petition filing date.

Dckt. 31.

DISCUSSION

While the court has not been provided with a certified copy of the trustee's deed, there is no dispute that Movant asserts to have purchased the Property at a trustee's sale.

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

The Chapter 13 Plan provides for only a \$100 a month plan payment. Dckt. 18. No provision is made for adequate protection payment or creation of an adequate protection fund to be held by the Trustee in lieu of a preliminary injunction bond which would be required under Federal Rule of Civil Procedure 65(c) and Federal Rule of Bankruptcy Procedure 7065.

November 24, 2015 at 1:30 p.m.

Debtor's plan does not provide for a "restructure" of his finances, but merely a nominal plan payment and the automatic stay for an indefinite duration rather than Debtor seeking and obtaining a preliminary injunction on the merits of his claims against Movant.

The court shall issue an order terminating and vacating the automatic stay to allow Bank of New York Mellon, fka Bank of New York, as Trustee, in trust for registered holders of CWABS, Inc., Asset-Backed Certificates, Series 2005-IM3, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 4110 Trotter Drive, Vallejo, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The Movant has not stated with particularity grounds upon which the request for waiver of 14-day stay of enforcement required under Rule 4001(a)(3) is based. The request for the 14-day, which is required and the court permitted to waive only for cause, is merely tacked on to the last sentence of the prayer at the end of the Motion.

No other or additional relief is granted by the court.

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 Bank of New York Mellon, fka Bank of New York, as Trustee, in trust for registered holders of CWABS, Inc., asset-backed certificates, series 2005-IM3 ("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 Bank of New York Mellon, fka Bank of New York, as Trustee, in trust for registered holders of CWABS, Inc., asset-backed certificates, series 2005-IM3 and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 4110 Trotter Drive, Vallejo, 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 not waived for cause shown by Movant.

No other or additional relief is granted.

4. [15-26969](#)-E-13 JESUS AVILA
JWC-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY
11-4-15 [[30](#)]

BBCN BANK 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, Creditors, and Office of the United States Trustee on November 6, 2015. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

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. At the hearing -----.

The Motion for Relief From the Automatic Stay is granted.

BBCN Bank, successor in interest to Innovative Bank ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2599 thru 2601 Esplanade, Chico, California (the "Property"). FN.1. Movant has provided the Declaration of Kelly Cho to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

FN.1. Movant describes the history of the BBCN Bank as follows:

On April 16, 2010, Innovative Bank was closed by the California Department of Financial Institutions. The Federal Deposit Insurance Corporation ("FDIC") was named receiver. Center Bank was appointed by the FDIC as the successor bank to Innovative. Further information regarding the failed Innovative Bank can be found at <http://www.fdic.gov/bank/individual/failed/innovative.html>. On or about November 30, 2011, Center Bank merged with Nara Bank. At the same time, Nara Bank changed its name to BBCN Bank. A true and correct copy of the Failed Bank Report regarding Innovative Bank is attached as Exhibit "4" to the accompanying Declaration of Kelly Cho. True and correct copies of the documents evidencing merger of Center Bank and Nara Bank, as well as the News Release regarding the new name of the bank as BBCN, are collectively attached as Exhibit "5" to the accompanying Declaration of Kelly Cho.

Dckt. 30 n.1; Dckt. 33 Exhs. 4, 5.

However, the Exhibits presented suffer from two evidentiary defects. First, the Cho Declaration does not provide grounds to authenticate the two documents. Fed. R. Evid. 901. Second, the Movant has not provided the court with a basis for determining that this out of court statement is admissible hearsay. Fed. R. Evid. 802, 803. The court will not presume to make evidentiary legal assertions for Movant, which may or may not be so intended.

Despite these defects, because Debtor did not file opposition, and the Trustee filed a nonopposition, the court will waive these evidentiary errors and take the assertions as true for the purpose of this motion. In the proposed Chapter 13 Plan, Debtor provides for the surrender of the Property to allow Movant to foreclose on it. Plan, Dckt. 10.

The Cho Declaration states that there are 2 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$7,697.06 in post-petition payments past due. The Declaration also provides evidence that there are pre-petition payments in default, with a pre-petition arrearage of \$37,943.91.

David Cusick, the Chapter 13 Trustee, filed a nonopposition on November 13, 2015. Jesus Avila, dba Tortilla Flats ("Debtor") did not file opposition to this motion.

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 \$1,131,350.89 (including \$971,211.89 secured by Movant's deed of trust), as stated in the Cho Declaration and Schedule D filed by Debtor. The value of the Property is determined to be \$750,000.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a 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, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

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.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving 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 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 BBCN Bank, successor in interest to Innovative Bank ("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 immediately vacated to allow BBCN Bank, successor in interest to Innovative Bank, 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 2599 thru 2601 Esplanade, Chico, 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 not waived.

No other or additional relief is granted.

5. [13-35992-E-13](#) BURT/SILVIA VARNER
PAS-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY
11-6-15 [[51](#)]

CARPET USA, LTD 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 - Hearing Required.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on November 6, 2015. By the court's calculation, 18 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). 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). 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 denied
without prejudice.**

Burt and Silvia Varner ("Debtor") commenced this bankruptcy case on December 23, 2015. Carpet U.S.A. Ltd. ("Movant") seeks relief from the automatic stay with respect to an asset identified as insurance proceeds (the "Asset").

Unfortunately, Movant has not provided sufficient notice to several parties. First, Movant's Certificate of Service demonstrates that only 18 days' notice was provided to parties served; under Local Bankruptcy Rule 9014-1(f)(1), 28 days' notice is required. Second, Ocwen Loan Servicing, LLC, filed a request

for special notice on all motions in this case. Dckt. 8.

Finally, Movant's Certificate of Service does not state whether David Cusick, the Chapter 13 Trustee, was provided notice. However, this defect is waived by the court as Trustee filed a nonopposition on November 10, 2015.

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 Carpet U.S.A. Ltd., ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the Motion for Relief from Automatic Stay is denied without prejudice.

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING
IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED
RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES**

ALTERNATIVE RULING

Burt and Silvia Varner ("Debtor") commenced this bankruptcy case on December 23, 2015. Carpet U.S.A. Ltd. ("Movant") seeks relief from the automatic stay with respect to an asset identified as insurance proceeds (the "Asset").

The moving party has provided the Declaration of Patricia Sisemore to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. The Sisemore Declaration provides the following testimony:

- A. This debt obligation arises out of a lawsuit filed by Tricorp Construction, Inc. On or about June 25, 2013, in the Sacramento County Superior Court under Case No. 34-2013-00147038 against Movant. Movant seeks to prosecute a cross-complaint for indemnity against Debtor Burt Varner dba Burton Tile, asserting Debtor should defend and indemnify Movant from Tricorp's claimed damages;
- B. The construction project that is the subject of the Tricorp suit is the Hyatt Hotel at U.C. Davis, CA. Tricorp contracted with Movant to install exterior tile at the Hotel and Movant subcontracted with Debtor to perform the installation. In short, Tricorp alleges that exterior tiles fell from the Hotel and that Movant is responsible for the repairs. Movant asserts that Debtor, as the subcontractor who performed the work, is responsible for any related damages or repairs and should defend and indemnify Movant;
- C. Debtor had in place one or more policies of commercial general liability insurance which should provide coverage for Debtor: two State Farm Insurance Policies, No 90-BH-V727-6 and No. 90-D4-0028-1.

Dckt. 53 ¶ 2-4.

Movant asserts two separate grounds for relief from the automatic stay. First, Movant argues that under 5th Circuit law:

[a]n insurance policy owned by the debtor at the time bankruptcy is filed becomes property of the estate, but the insurance proceeds are not assets of the bankruptcy estate which section 362 was intended to protect because such proceeds are only payable to the injured party and not the debtor.

11 U.S.C § 541; *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir. 1987).

Second, Movant cites to a Delaware District Court case for whether to grant relief from automatic stay. *In re Rexene Products Company*, 141 B.R. 574, 576 (Bankr.D.Del. 1992). The test articulated is:

- A. Whether any great prejudice to either to the bankruptcy estate or debtor will result from continuation of the civil suit;
- B. Whether the hardship of the [Movant] by maintenance of any state action considerably outweighs the hardship of the debtor; and
- C. Whether the creditor has a probability of prevailing on the merits.

Dckt. 55. Under this test, Movant argues:

- A. The first prong is met because Movant seeks to recover the applicable insurance coverage, which Debtor has no interest in and will not prejudice Debtor;
- B. Movant's hardship outweighs Debtor's hardship because Movant seeks compensation for damages allegedly caused by Debtor's negligence, and for which he owes indemnity to the Movant. Prohibiting the state court case would prevent Movant from prosecuting its claims against the Debtor. Also, Debtor faces to great hardship because the cost of defense is covered by the Debtor's insurer, should the insurer choose to defend the case;
- C. The third prong is met because Debtor contractor to perform the work in the Tricorp case, and thus Debtor has ultimate responsibility for any damages. "There is no question that Debtor should indemnify Movant for the Tricorp claims, since any damage would be due to Debtor's active negligence."

Dckt. 55 ¶ 10-12.

David Cusick, the Chapter 13 Trustee, filed a nonopposition on November 10, 2015. Debtor did not file opposition to this motion.

RULING

The court maintains the right to grant relief from stay for cause when a 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 and the estate may not receive the insurance proceeds. 11 U.S.C.

§ 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court shall issue an order terminating and vacating the automatic stay to allow Carpet U.S.A., Ltd., and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

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 Carpet U.S.A., Ltd. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as insurance policy proceeds ("Asset"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

No other or additional relief is granted.