

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

November 25, 2014 at 1:30 p.m.

1. [14-30234](#)-E-13 CHARLES FRANK  
LDH-1 Pro Se

MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION  
FOR ADEQUATE PROTECTION  
10-23-14 [[13](#)]

MORTGAGE EQUITY CONVERSION  
ASSET TRUST 2011-1 VS.

**Final Ruling: No appearance at the November 25, 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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on October 23, 2014. By the court's calculation, 33 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). 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 denied without prejudice as moot.**

Mortgage Equity Conversion Asset Trust 2011-1, Mortgage Backed Securities, Series 2011-1 ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6229 29th Street, Sacramento, California (the "Property"). The moving party has provided the Declaration of Lawrence Harris to introduce evidence as a basis for Movant's contention that Charles Frank ("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

November 25, 2014 at 1:30 p.m.

Trustee's Sale on July 17, 2014. Based on the evidence presented, Debtor would be at best tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Sacramento and received a judgment for possession, with a Writ of Possession having been issued by that court on October 7, 2014. Exhibit G, Dckt. 16.

Movant has provided a properly authenticated copies of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership, the Judgment, and Writ of Possession. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(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.

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).

Though Movant has shown sufficient evidence for this court to grant relief from the automatic stay in regard to the Property, Debtor's case was dismissed on November 3, 2014. Dckt. 20. Upon dismissal of a case, the stay expires. 11 U.S.C. § 362(c)(2)(B). There is no stay left for the court to grant relief from in this case, rendering the motion is moot.

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 Mortgage Equity Conversion Asset Trust 2011-1, Mortgage Backed Securities, Series 2011-1 ("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 to the extent the Motion seeks relief from the automatic stay as to Charles Frank ("Debtor"), the case having been dismissed, the Motion is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(B).

No other or additional relief is granted.

2. [12-93049](#)-E-11 MARK/ANGELA GARCIA  
MF-1 Mark Hannon

MOTION TO COMPEL O.S.T.  
11-19-14 [[427](#)]

**Tentative Ruling:** The Motion to Compel was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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)(3).**

-----  
Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on November 19, 2014. By the court's calculation, 6 days' notice was provided.

The Motion to Compel was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 -----  
-----.

<b>The Motion to Compel is denied without prejudice.</b>
--

Iain MacDonald ("Creditor") filed the Motion to Compel on November 19, 2014. Dckt. 427. Creditor requests that the court issue an order compelling the person most knowledgeable at YP Western Directory, LLC, f/k/a Pacific Bell Directory and its attorney of record, Sheryl Noel ("Defendants") to appear for depositions.

Creditor's Memorandum of Points and Authorities (Dckt. 428) states that Defendants were served with notices of deposition and refused to appear. Creditor asserts that he is entitled to attorney's fees and expenses caused by Defendants' improper objections to appearing under Federal Rule of Civil Procedure 37(a)(5)(A). Counsel has incurred over 10 hours of time spent dealing

with Defendants' conduct in regards to the depositions.

#### **COURT'S EVIDENTIARY SCHEDULING ORDER**

Upon review of the Creditor's Motion and the Response From Debtors, the court issue an Evidentiary Scheduling Order. The court restates as part of this Ruling, pertinent parts of that Order.

The court has been presented with an emergency motion for an order compelling the attendance of the person most knowledgeable at YP Western Directory, LLC, f/k/a Pacific Bell Directory, the creditor proponent of the proposed Chapter 11 Plan in this case and Sheryl D. Noel, its attorney, to appear for Depositions. In considering this Motion the court begins with the basics. Federal Rule of Bankruptcy Procedure 9013 requires that all motions state with particularity the grounds upon which the relief is based. The Motion, Dckt. 427, states with particularity the following grounds:

- A. The grounds for the Motion are detailed in the accompanying memorandum in support and declarations of Iain A. Macdonald and Brenda S. Johnson.
- B. "The [unidentified] parties' [unstated] objections are both spurious and improper."
- C. The parties should be compelled for the depositions.
- D. Movant seeks attorneys' fees and expenses "occasioned" by the [unidentified] parties objections.
- E. Fed. R. Civ. P. 37(a)(5)(A).

The requirements of Federal Rule of Bankruptcy Procedure 9013, and the corresponding identical provisions in Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, have regularly been applied by the court.

Such a discovery motion should be very straightforward. Service was properly made, the depositions were set, the deponent refused or failed to appear. Further, that in failing to appear, no relief was sought from the court excusing the deponent from appearing at the deposition. There is no need for vitriolic, sarcastic comments or name calling. Neither the Movant nor any responding parties are arguing the merits of the underlying dispute.

#### **REVIEW OF MOTION**

The present Motion fails to state the grounds, even generally, but instead tasks the court to read other pleadings and assemble for Movant the grounds the court thinks Movant would assert, if Movant has set forth the grounds. In effect, Movant seeks to deputize the court as a law clerk or associate attorney to prepare its pleadings. The court does not provide such services to the parties.

[Section discussing the Requirements of Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 and 9013 not restated, but incorporated herein by this reference.]

**November 25, 2014 at 1:30 p.m.**

### **REVIEW OF ADDITIONAL PLEADINGS**

Iain Macdonald, a bankruptcy attorney, who is a creditor in this case, has provided his declaration in support of the Motion. In it, he states under penalty of perjury,

- A. A Chapter 11 Plan was filed by YP Western Directory, LLC, ("YPWD") which was signed by Sheryl D. Noel, as the attorney for YPWD.
- B. The YPWD plan is similar to that previously filed by the Debtors.
- C. Because the Debtors have lost their right to file a plan in this small business bankruptcy case, YPWD may be a shill for the Debtors.
- D. Mr. Macdonald called Ms. Noel and left a message, but no return call was received from Ms. Noel.
- E. Mr. Macdonald followed up and received an email from Ms. Noel stating that her clients were not agreeable to being deposed.
- F. Mr. Macdonald states that the depositions were noticed and in response Ms. Noel advised him that the YPWD and Ms. Noel would not appear for the depositions.
- G. Mr. Macdonald states that discovery is necessary for the confirmation hearing on the YPWD proposed Chapter 11 Plan.

Declaration, Dckt. 429. Clearly some of what Mr. Macdonald wants to testify to in the declaration needed to be stated as grounds in the Motion.

Mr. Macdonald also filed two sets of exhibits which consist of 65 pages of documents which he requests the court to canvas and pick out what may be grounds that should be stated in the Motion. Dckts. 430 and 432. The court does not have the time nor resources to provide such services. Such work on behalf of one party against another party is not appropriate.

### **RESPONSE BY DEBTORS**

Though they are not the subject of the discovery sought concerning YPWD's creditor plan, the Debtors have rushed in with a response on behalf of YPWD. Dckt. 445. Debtors state that in their list of creditors are four attorneys who have previously represented the Debtors. The Debtors note that only the attorney who represents YPWD has not represented the Debtors. The Debtors do not point out the significance of YPWD's attorney not having represented the Debtors and not being a creditor of the Debtors.

The Debtors then retort that they find it "juvenile" that Mr. Macdonald would question whether YPWD was serving as a "shill" for the Debtors in prosecuting the YPWD Plan. Debtors assert that this reference is resorting to "name calling." Debtors further contention that Mr. Macdonald should not be allowed to depose Ms. Noel because "she has no personal knowledge of the

contents of the disclosure statement..." Debtors contend that the deposition "would be limited to name calling."

Though Debtors argue that Ms. Noel knows nothing about the information in the disclosure statement, they then assert that the disclosure statement was prepared jointly by Debtors' counsel and Ms. Noel. In light of the requirements of Federal Rule of Bankruptcy Procedure 9011, since Ms. Noel participated in the preparing of the disclosure statement, then she has specific obligations and duties relating to the information stated therein.

Debtors then assert the 1900 year old saying, "If you don't like the message, then kill the messenger," in topping off why discovery of the plan proponent is unreasonable. The issue before the court with discovery is not what was said at the deposition, but that people are asserting that they do not have to give a deposition because they say there is "nothing to be discovered."

Finally, Debtors, on behalf of YPWD, request that the court deny the Motion. Debtors provide no basis for having standing to defend YPWD from Mr. Macdonald's attempts to conduct discovery of the plan proponent. The Response and seeking to defend YPWD appears to be pregnant with the implication that the Debtors are controlling, or having YPWD act merely as the Debtors' agent or proxy, in proposing the Chapter 11 plan now before the court.

#### **NEED FOR ORDERLY DISCOVERY**

This brief exchange and failure to comply with the basic pleading requirements under the Federal Rules of Civil Procedure and the Federal Rules of Civil Procedure make it clear that the court must exercise proper judicial control over discovery in this Contested Matter. Failure of the court to do so will doom this Chapter 11 case and YPWD's attempts to promote a Chapter 11 creditor plan.

The court set the Discovery Conference for this Contested Matter to be conducted on November 25, 2014, at 1:30 p.m. in conjunction with the hearing on the Motion. In light of the failure to comply with Federal Rule of Bankruptcy Procedure 9013, the court's decision is to deny the Motion without prejudice. However, the court perceives a benefit for the parties, and the court, in establishing a set discovery procedure in this case.

Iain Macdonald, the creditor former attorney for the Debtors, and Mark J. Hannon, Debtors' bankruptcy counsel, have been ordered to appear at the hearing on the Motion and the Discovery Conference. Such appearances were required to be telephonic, with no in-person appearances for the November 25, 2014 hearings are permitted for these two attorneys. The court perceived that these out-of-town counsel traveling to Sacramento would only lead to further cross demands for more attorneys' fees.

At the Discovery Conference the court considered issuing a discovery order to establish procedures in connection with the confirmation proceedings, which includes the following,

- A. Requiring mail or postal service of all discovery;
- B. Specific meet and confer requirements;

- C. All depositions to be conducted in the conference room outside of Department 33 of the United States Bankruptcy Court in Sacramento, California;
- D. All discovery production of documents to be made in the conference room outside of Department 33 of the United States Bankruptcy Court in Sacramento, California;
- E. All depositions and production of documents to be scheduled in connection with the confirmation proceedings to be conducted when the judge in this case is either holding court or in chambers in the Sacramento Courthouse. For any such discovery, the judge shall be available to immediately hear and rule on any discovery objections.

The court expressly permitted telephonic appearances for any other parties in interest who desire to participate in the hearing and discovery conference. However, the court's order expressly states that the costs of any party in interest choosing to appear in person rather than availing themselves of appearing telephonically shall be borne by those persons themselves.

The Court's decision is to deny the Motion to Compel without prejudice.

The court shall issue a Discovery Order for the Confirmation of the YP Western Directory, LLC proposed Chapter 11 Plan, which Discovery Order shall provide,

- A.
- B.
- C.
- D.

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 to Compel filed by Ian Macdonald, 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 is denied without prejudice.