

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein

Chief Bankruptcy Judge

Sacramento, California

December 16, 2014 at 1:30 p.m.

1. [14-23313](#)-C-13 PAUL/LYNDA FANFELLE CONTINUED MOTION FOR RELIEF
 ANF-2 Peter G. Macaluso FROM AUTOMATIC STAY
 7-21-14 [[31](#)]

 PAWNEE LEASING CORPORATION
 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, parties requesting special notice, and Office of the United States Trustee on July 21, 2014. Fourteen days' notice is required. That requirement was met.

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.

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PRIOR HEARINGS

The court held an initial hearing on the Motion on August 5, 2014. At the hearing, the parties indicated that they were close to reaching terms for providing for this claim through Debtor's plan. The court continued the hearing on the motion to allow for continued negotiations.

At the August 19, 2014 hearing, Debtor and Movant represented that they were nearing a stipulated resolution. The court granted a further continuance per parties' request.

Debtor filed a Supplemental Opposition on September 2, 2014, which is incorporated into the court's current tentative ruling.

A continued hearing was held on September 9, 2014. During that hearing, the parties requested a continuance to complete settlement negotiations or to determine that no settlement was possible. The court granted a continuance to September 30, 2014.

At the hearing on September 30, 2014, the court granted a further continuance to October 28, 2014. The parties announced at the hearing that they had reached a stipulated agreement that would be "documented in the next few days." See Civil Minutes, Dkt. 62.

STIPULATION TO CONTINUE

On October 14, 2014, Debtors uploaded to the court's docket (Dkt. 72) a Stipulation with Creditor to continue the hearing on Debtor's Motion to Confirm to December 16, 2014, as Debtors and Pawnee Leasing wanted time to obtain appraisals for the secured equipment. The court finds it safe to assume the secured equipment referenced in that stipulation is the same secured equipment which is subject to this current Motion for Relief from Stay.

On October 16, 2014, the court entered an order approving the Stipulation to continue the Motion to Confirm to December.

As of December 10, 2014, no new documents appear on the court's docket. The court has yet to see a stipulated resolution to this motion and reverts to its previous decision to grant the Motion for Relief from the Automatic Stay.

DISCUSSION

Pawnee Leasing Corporation seeks relief from the automatic stay with respect to the personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet. The moving party is seeking to exercise its lawful rights and remedies under the written Lease Agreement entered into with Debtors. Movant provides the Declaration of Sandi Carr to introduce evidence (Dkt. 33).

The Carr Declaration states that on September 16, 2013, Innovative Capital Corp., as Lessor, entered into a Lease Agreement with Crazy for Yogurt Inc. Pursuant to the terms of the Lease Agreement, Innovative Capital Corp. Leased to Crazy for Yogurt a Soft Serve Freezer and 87" Dipping Cabinet. On September 16, 2013, Debtors executed a Guaranty whereby they

guaranteed payment by Crazy for Yogurt of all sums to be paid under the terms of the Lease Agreement (Exh. 1), together with costs and attorneys' fees incurred in the collection and enforcement of the Guaranty. (Exh. 2).

Prior to Debtors filing for bankruptcy protection, Innovative Capital Corp. assigned its Lease Agreement to Movant, Pawnee Leasing Corporation. The Assignment is attached as Exh. 3 to Movant's Motion. Movant filed a UCC-1 Filing Statement on the personal property with the California Secretary of State's office (Exh. 4).

The Lease Agreement provides that if the Lessee defaults in the performance of any of its obligations, the Movant may repossess the personal property. Movant alleges that Debtors and Lessee failed to pay the pre-petition March 1, 2014 payment and post-petition April-June 2014 payments. In total, the amount due to cure the default is \$4,535.72. The total balance due under the terms of the Lease Agreement is \$35,968.08.

The declaration offered by Pawnee Leasing Corporation states that it is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and believe [sic]." 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."

Movant has provided the court with Exhibits demonstrating the leasing and guaranty relationships. Exhibit 1 to the deficient declaration is the Lease Agreement executed between Innovative Capital Corp. and Crazy For Yogurt, Inc. The Lease Agreement is signed by Lynda Fanfelle as "President" of Lessee and dated September 16, 2013. Exhibit 2 to the declaration is the Guaranty executed by Lynda and Paul Fanfelle. The language of the Guaranty provides that the "Guarantor(s) now hereby individually, jointly and severally, absolutely and unconditionally guaranty to the Lessor (and any person or firm the Lessor may transfer its interest to) all payments and other obligations owed by the Lessee to the Lessor under the Lease"

The Assignment of Lease is Exhibit 3 and demonstrates a transfer of interest from Innovative Capital Corp. to Pawnee Leasing Corporation concerning the Crazy For Yogurt, Inc. lease.

Debtors' Opposition

Debtors argue that no cause exists for the relief requested. Debtors argue that the reason Movant has not been paid is because Movant has not filed a proof of claim and Trustee cannot disburse payments to Movant without a proof of claim on file.

Further, Debtor argues that the contract relationship between Debtor and Movant is not a "pure" lease and that Debtors have a beneficial interest in paying the claim in Class 2 of their plan. Debtors propose making an adequate protection payment of \$380.00 per month.

Debtors' Supplemental Opposition

Debtors reiterate that no cause exists for the requested relief.

Debtors assert that their counsel prepared a stipulation that was circulated to and rejected by movant. Debtors state that they filed an amended plan providing for payments in full with a payment of no less than \$906.27 per month to movant as a class 2(a) claim.

Discussion

11 U.S.C. § 362(a)(6) provides that the filing of a petition under section 301, 302, or 303 of the Code operates as a stay of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. A "claim" consists of a right to payment, whether or not it is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. 11 U.S.C. § 105(5)(A). Here, Movant is seeking to enforce a claim against the Debtors in their role as guarantors under the lease agreement. The claim became fixed in nature when the lessees failed to make the March 1, 2014 pre-petition payment under the lease, triggering the guarantor's responsibility under the Equipment Lease Guaranty, guaranteeing all payments owed by the lessee to the lessor under the lease (Exh. 2, Dkt. 33).

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 as guarantors under the lease. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

A copy of the lease is hidden behind a declaration. Local Bankruptcy Rule 90061 and the Revised Guidelines for Preparation of Documents requires that the motion, points and authorities, each declaration, and the exhibit document (all exhibits being included in one document) be filed as separate documents. While Debtors argue that this is not a pure lease, they provide no legal arguments or evidence as to why it is an impure lease. Additionally, Debtors do not provide legal argument or evidence as to why they can assert the rights to the equipment under the lease when the Lessee on the contract is Crazy for Yogurt, Inc. Exhibit 1, Dckt. 33.

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 Pawnee Leasing Corporation, its
agents, representatives, and successors, and

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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 personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet.

2. [14-24936](#)-C-13 JERRY CRUSOS
JGD-1 C. Anthony Hughes

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION TO
CONFIRM TERMINATION OR ABSENCE
OF STAY
12-3-14 [[56](#)]

STEPHEN MILSTEIN 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, parties requesting special notice, and Office of the United States Trustee on December 3, 2014. Fourteen days' notice is required. That requirement was met.

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.

Secured Creditor, Stephen Milstein, seeks an order of the court confirming that the automatic stay is not in effect or, in the alternative, granting relief from the automatic stay.

WHETHER THE AUTOMATIC STAY IS IN EFFECT

Pursuant to 11 U.S.C. § 362(c)(3)(A), if a single case is filed by an individual debtor under Chapter 7, 11, or 13, and if a single case of the debtor was pending within the preceding 1-year period but was dismissed, the stay with respect to any action taken with respect to debt or property

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securing such debt shall terminate with respect to the debtor on the 30th day after the filing of the later case.

Here, the Debtor filed a previous Chapter 13 case on May 10, 2013 (Case No. 13-26552). The first case was dismissed on May 24, 2013 and closed on July 11, 2013.

The instant case was filed on May 9, 2014. Therefore, when Debtor filed his second case, he has a previous case that was pending within the preceding 1-year period that was dismissed. Therefore, without a court order extending the stay, the automatic stay expired in the second case, with respect to the debtor, on the 30th day after the filing of the case, or June 9, 2014.

A review of the docket shows that Debtor did not seek an extension of the stay. Therefore, with respect to the Debtor, the automatic stay is currently not in effect.

RELIEF FROM THE AUTOMATIC STAY

The court will separately consider the relief motion to determine the extent of Creditor's rights against the collateral.

Secured Creditor seeks relief from the automatic stay with respect to the real property commonly known as 752-250 Scott Road, Chilcoat, California. The moving party has provided the Declaration of Stephen Milstein to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Milstein Declaration states that the unpaid balance owed by Debtor pursuant to the promissory note was due in full on August 10, 2013. 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 \$202,321 (including \$172,000 secured by movant's first trust deed), as stated in the Milstein Declaration and Debtor's Schedule D, while the value of the property is determined to be \$121,500, as stated in Schedules A and D filed by Debtor.

The Chapter 13 Trustee filed a statement of non-opposition to the Motion being granted.

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).

The court shall issue a minute order terminating and vacating the automatic stay to allow Stephen Milstein, 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 moving party has 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 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 Stephen Milstein, 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 752-250 Scott Road, Chilcoat, California.

IT IS FURTHER ORDERED that to the extent the Motion seeks relief from the automatic stay as to the debtor, it is denied as moot pursuant to 11 U.S.C. § 362(c)(3)(A).

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

3. [14-27250](#)-C-13 MATTHEW/JENNIFER MOTION FOR RELIEF FROM
APN-1 JUHL-DARLINGTON AUTOMATIC STAY
Douglas B. Jacobs 11-12-14 [[38](#)]
WELLS FARGO BANK, N.A. VS.

CASE DISMISSED 12/2/14

Final Ruling: No appearance at the December 16, 2014 hearing is required.

The case having previously been dismissed, the Motion is dismissed as moot. The Movant not having requested relief pursuant to 11 U.S.C. § 362(d)(4), the court will not address the merits of the motion.

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 for Relief from Stay
having been presented to the court, the case
having been previously dismissed, and upon review
of the pleadings, evidence, arguments of counsel,
and good cause appearing,

IT IS ORDERED that the Motion is
dismissed as moot, the case having been
dismissed.

4. [14-21694](#)-C-13 RACHEL TORRES
Peter L. Cianchetta

ORDER TO APPEAR FOR EXAMINATION
(NATIONSTAR MORTGAGE, LLC)
10-31-14 [[44](#)]

This is a post-judgment order to appear filed by the Chapter 13 Debtor, Rachel Torres, for the examination of Creditor, Nationstar Mortgage, LLC. The court having signed the order to appear for examination, Nationstar Mortgage, LLC shall appear and furnish information to aid in the enforcement of the money judgment against it.