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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6 MODESTO DIVISION
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8 In re)
9 JENNIFER ROSS,) Case No. 05-90501-A-13G
10) Docket Control No. JDL-2
11 Debtor.) Date: August 22, 2005
12) Time: 2:00 p.m.
13)

14 *On August 22, 2005 at 2:00 p.m., the court considered the*
15 *motion of secured creditor Downey Savings & Loan Association for*
16 *relief from the automatic stay in the above-captioned case. The*
17 *text of the final ruling appended to the minutes of the hearing*
18 *follows. This final ruling constitutes a "reasoned explanation"*
19 *for the court's decision and accordingly is posted to the court's*
20 *Internet site, www.caeb.uscourts.gov, in a text-searchable format*
21 *as required by the E-Government Act of 2002. The official record*
22 *of this ruling remains the ruling appended to the minutes of the*
23 *hearing.*

24 **FINAL RULING**

25 The motion is granted pursuant to 11 U.S.C. § 362(d)(1) to
26 permit the movant to conduct a nonjudicial foreclosure sale and
27 to obtain possession of the subject property following sale.
28 There is ample cause to terminate the automatic stay.

First, the movant extended credit to the owner of the
subject property, the debtor's daughter, at a point in time when
the debtor had no interest of record in the property. After the
deed of trust was recorded, a 1/2 interest in the property was
conveyed to the debtor.

1 Second, the debtor's daughter filed four chapter 13
2 petitions, three in this court in 2003 and 2004, and a fourth in
3 the Central District. None of these cases were successful and
4 all were dismissed. The fourth petition was dismissed on
5 February 23, 2005. The dismissal order barred the daughter from
6 filing another petition for 180 days.

7 Third, on March 17, 2005, the debtor picked up the slack.
8 She filed her own chapter 13 petition. She failed to list the
9 movant as a creditor even though it held a security interest in
10 her home. The movant did not receive notice of the petition when
11 it was filed or shortly thereafter. The proposed plan was not
12 served on the creditor. The debtor also made no arrangements to
13 make plan or adequate protection payments to the movant for the
14 first four months of this case.

15 Fourth, the amended plan has no hope of confirmation. While
16 the amended plan now provides for the movant's claim, the plan is
17 not likely to be feasible. Schedules I and J show monthly
18 disposable income of \$1,410. The plan requires monthly payments
19 of \$2,207 beginning in the fifth month. The debtor will likely
20 be unable to maintain these payments. That is, the plan is not
21 feasible as required by 11 U.S.C. § 1325(a)(6).

22 Also, given the transfer of an interest in the property to
23 the debtor, the movant's loan has accelerated and is all due and
24 payable. Consequently, any plan must provide for the
25 satisfaction of the movant's entire claim during the case. The
26 plan may not simply provide for a cure of the arrears.

27 The movant has no privity of contract with the debtor. The
28 absence of privity of contract does not prevent a debtor from

1 including a secured claim in the debtor's chapter 13 plan. The
2 definition of a claim in 11 U.S.C. § 101(5) encompasses both a
3 right to payment from the debtor or a right to payment that can
4 be satisfied from the debtors' property. Cf. Johnson v. Home
5 State Bank, 111 S.Ct. 2150 (1991) (holding that a debtor may
6 reorganize in chapter 13 a claim for which the debtor has no
7 personal liability but is secured by the debtor's property).
8 Therefore, the mere fact that a debtor owns real property
9 encumbered by a creditor's deed of trust means that the debtor
10 may potentially reorganize the debt.

11 However, the objecting creditor's deed of trust provides:
12 "If all or any part of the Property is sold or transferred . . .
13 without Lender's prior written consent, Lender may . . . require
14 immediate payment in full of all sums secured by this Security
15 Instrument." This language is also in the note.

16 Even if the transfer between the debtor and her daughter did
17 not involve the exchange of consideration, the property was
18 nonetheless transferred to the debtor. Despite the absence of a
19 "sale," there was a transfer that triggered the "due on transfer"
20 clause. The movant has the contractual right to accelerate the
21 note. Therefore, the plan must provide for the claim in Class 2.
22 That is, because it is all due, it must be paid in full through
23 the plan. The plan, however, provides for the claim in Class 1.
24 The debtor is attempting to treat the claim as if it is not all
25 due and payable and she is attempting to cure the pre-petition
26 arrearage. This is not permissible. The plan must provide for
27 payment in full of this claim as required by 11 U.S.C. §
28 1325(a)(5)(B).

1 While the debtor now is apparently willing to sell the
2 property (and presumably willing to pay the movant's claim in
3 full), as evidenced by the second amended plan filed on August
4 19, that plan indicates that there are yet more problems. That
5 plan identifies the IRS and the State of California as holding
6 substantial secured claims of \$247,587 and \$37,8994.58,
7 respectively. The claims are not scheduled nor have these
8 governmental entities heretofore received notice of this case.
9 Ignoring the obvious due process problems caused by the failure
10 to give notice to these creditors, the existence of these claims
11 make any plan premised on a sale of the residence infeasible.
12 Taken into account with two voluntary liens held by the movant
13 and a junior lien holder (these two liens secured \$189,157.15
14 according to the second amended plan), in order to pay all the
15 liens, the residence would need to sell for approximately
16 \$475,000 (not including costs of sale). According to the plan,
17 the property has a value of \$415,000. There is no conceivable
18 way, therefore, that secured claims can be satisfied from the
19 sale of the subject property, at least in the near future.

20 The foregoing circumstances convince the court that this
21 case and the proposed amended plan have been filed in bad faith.
22 The debtor and her daughter are engaged in a tag team bankruptcy
23 scheme designed to hinder, delay, and defraud the movant. They
24 are filing successive petitions that had and have no chance of
25 success. Their only purpose is to prevent foreclosure. This is
26 cause to terminate the automatic stay. This relief shall be
27 effective for 180 days in connection with any petition filed by
28 the debtor. If the order terminating the stay is recorded, this

1 relief shall also be effective for 180 days as to any and all
2 other persons who may file a petition during that period.

3 Dated:

4 By the Court

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Michael S. McManus, Chief Judge
7 United States Bankruptcy Court
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