

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 26, 2021 at 1:30 p.m.

1. **20-21910-E-13** **TIMOTHY TROCKE**
GLF-2 **Gary Fraley**
ABLP PROPERTIES VISALIA LLC VS.

**CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR ADEQUATE
PROTECTION
10-7-20 [99]**

Tentative Ruling: 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.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 7, 2020. By the court's calculation, 34 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is xxxxxxx.

Roger Anderson, Trustee of the RWA Trust dated March 14, 2014 ("Movant") seeks relief from the automatic stay with respect to Timothy Tobias Trocke's ("Debtor") real property commonly known as 1671 Rosalind St., Sacramento, California ("Property").^{FN.1.} Movant has provided the Declaration of Roger Anderson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

FN. 1. In the Notice of *Errata*, Dckt. 117, Movant corrects a typographical error in the Motion filed on October 7, 2020, in which the Movant is misidentified.

Movant argues Debtor has not made two (2) post-petition payments, with a total of \$4,677.50 in post-petition payments past due. Declaration, Dckt. 102.

CHAPTER 13 TRUSTEE’S RESPONSE

David P. Cusick (“the Chapter 13 Trustee”) filed a Response on October 26, 2020. Dckt. 108. Trustee requests that the court take into consideration that the Debtor is delinquent \$7,965.00 under the last proposed plan and that the Debtor is \$4,677.50 delinquent to Movant. *Id.*, at 2. Moreover, Trustee notes that there is no plan pending, with Debtor’s last proposed plan having been denied confirmation on September 29, 2020. *Id.*, at 1.

CHAPTER 13 DEBTOR’S RESPONSE

The Chapter 13 Debtor filed a Response on October 27, 2020. Dckt. 111. Debtor asserts that an offer of \$243,000 for the Property was accepted on October 16, 2020 and requests a continuance of this Motion to after December 15, 2020 so as to allow for the lender documents to be received and the escrow and sale be completed. *Id.*, ¶¶ 5-6. Debtor explains that the Movant is completely protected with Movant having a claim of \$159,000 which will pay off with this sale and Debtor will still have equity of \$71,850 to be distributed to him. *Id.*, ¶ 5.

Reply of Movant

Movant’s Reply (Dckt. 119) asserts that while the Debtor has now been in Chapter 13 for seven months, there has been no plan confirmed. That Debtor is in default in plan payments since September 2020. Movant asserts that the opposition is somewhat cryptic.

Further, it is asserted that if the court does not grant the relief requested, Debtor should be making an adequate protection payment to Movant.

DISCUSSION

In the Motion for Relief from the Stay, Movant does not assert that cause exists because Movant is not adequately protected due to the amount of the secured claim being in excess of the value of the Property. The Motion is devoid of any allegation as to the value of the Property.

The Motion does clearly state that Movant asserts the right not only to the 10% non-default rate of interest in the Note that is secured by the Property, but also the 18% default rate of interest. This loan was made in 2018, and it appears that by extracting a 10% interest rate and an 18% default rate, Movant was well aware of a high likelihood of a default and delay in foreclosure, and has built that into the Note. Additionally, such may reflect that Movant was well aware of a limited financial acumen of the Debtor and limited ability to handle his finances.

The Motion states that pursuant to the longstanding defaults by Debtor, a non-judicial foreclosure sale was recorded on December 4, 2019. Motion, p. 2:22-24, Dckt. 99; Declaration, ¶ 9, Dckt. 102. Debtor's prior Chapter 7 case and this Chapter 13 case have stayed Movant from conducting the foreclosure sale. Declaration, ¶ 10; Dckt. 102.

Debtor's Opposition is simple – some unidentified person made an offer on October 16, 2020, to purchase the Property for \$243,000.00. Opposition, ¶ 2; Dckt. 111. This was after the Property was “put on the market” on September 27, 2020. *Id.*, ¶ 1. But due to the COVID-19 pandemic, an unidentified lender is “running behind on document preparation.” *Id.*, ¶ 4.

The sales price is stated to be \$243,000, and after costs of sale, there is \$71,850.00 in equity in the Property to adequately protect Movant's claim. *Id.*, ¶ 5. Debtor seeks to have the hearing continued to December 15, 2020, so the loan documents can be completed and the sale closed.

A Declaration purporting to state Debtor's testimony under penalty of perjury is provided. Dckt. 112. However, this appears to merely be a cut and paste of Debtor's Counsel's arguments in the Opposition.

Debtor filed exhibits for his Opposition on October 10, 2020. Dckt. 114. The exhibits appear to bleed over into “Support Documents” filed with the exhibits. Dckts. 115, 116. Unfortunately, none of the exhibits have been authenticated as required by Federal Rules of Evidence 901 et seq.

Questionable Prosecution of Case

A review of the Docket indicates that notwithstanding Debtor's Counsel arguing that the Property was “put on the market on September 27, 2020, and a offer was received on October 16, 2020,” Debtor has not sought to obtain authorization to employ a real estate broker (such authorization necessary for such professional to be compensated for the services provided), nor has the Debtor filed a motion for authorization to sell the property for a sale Debtor hopes to quickly close.

Ignoring these legal requirements under the Bankruptcy Codes is not indicative of a Debtor who is diligently pursuing a sale in good faith.

Looking at the original Schedules filed, Debtor stated under penalty of perjury that the Property had a value of only \$210,000. Schedule A/B, Dckt. 11 at 3. On Schedule D Debtor listed Movant as having a secured claim of (\$100,000). *Id.* at 11. This would then leave a \$110,000 in equity which Debtor could claim as exempt on Schedule C, citing California Code of Civil Procedure § 704.730 as the basis for the exemption. California Code of Civil Procedure § 704.730 provides:

§ 704.730. Amount of homestead exemption

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars (\$75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars (\$100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted

sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) One hundred seventy-five thousand dollars (\$175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:

(A) A person 65 years of age or older.

(B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

(C) A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars (\$25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars (\$35,000) and the sale is an involuntary sale.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

Debtor does not state which provision is applicable, but two of them clearly are less than the \$110,000 he is claiming.

As this court addressed in connection with Movant and the 18% interest for what appears to have been a foreseen troubled lender and delayed payment, Movant appears to be more than adequately protected – if there was a financially competent debtor prosecuting a bankruptcy case. Civil Minutes, Dckt. 106.

However, Debtor has demonstrated that he does not have the financial and business knowledge to prosecute this case (the court giving the Debtor and Counsel the benefit of the doubt that the failure to obtain authorization to employ a real estate broker was mere inadvertence and not part of a

scheme to get “free” real estate broker services). At this juncture, it appears the court has three choices:

1. Grant Relief From the Stay and Allow Movant, who clearly knew that this Debtor would not be able to pay the loan back, to foreclose and take nearly \$100,000 in equity as a “bonus” for having made a loan with an 18% interest rate;
2. Order the appointment of a personal representative as provided in Federal Rule of Civil Procedure 25, as incorporated into Federal Rules of Bankruptcy Procedure 7025 and 9014, and then have that personal representative hire legal counsel to prosecute the sale of the Property, pay the claims in this case, and “save” for Debtor his exempt equity (after paying the costs and expenses of the personal representative and the professionals hired by the personal representative); or
3. Convert this case to Chapter 7, in which Debtor could not get a discharge in light of his December 2019 Chapter 7 case in which he was granted a discharge, and have the Chapter 7 trustee conduct hire the professionals, conduct the sale, have all of the trustee’s and trustee’s professionals expenses and fees paid, and “save” the debtor the equity in the property.

Though normally the court would order a debtor in this situation to make adequate protection payments from the monthly plan payments, Debtor’s defaults have documented that he is bereft of the financial ability to pay. As show on the original and various amended Schedules I filed in this case, Debtor has no income and is dependant upon gifts from his significant other and his sister to survive from day to day. See latest Amended Schedule I; Dckt. 83, in which Debtor lists having \$942 a month in Social Security, which is only 22.7% of his stated monthly income. His sister provides \$1,760, which is 42% of the stated monthly income, and his significant other provides \$942 (exactly the same as the stated amount of Social Security benefit received), which is an additional 22.7%. The balance of monthly income is stated to be \$500 in room rent paid by “Girlfriend’s Sister”). ^{FN.2.}

FN. 2. As shown on the Statement of Financial Affairs, Debtor’s lack of income is not a new turn of events. On the Statement of Financial Affairs, in response to Question 4, Debtor states having the following income from employment or business in the current year the case was filed and in the two preceding years:

YTD 2020	NONE
2019	NONE
2018	NONE

Dckt. 11 at 21. For other income, in response to Question 5, Debtor states receiving Social Security of \$11,000 +/- a year, plus some “income” form his “significant other.” *Id.* at 22.

In the Statement of Financial Affairs for his 2019 bankruptcy states that for 2017 that he had

no income from employment or a business. 19–27969; Stmt. Fin. Affs., Question 4, Dckt. 1 at 31. His only other income stated in the prior case for 2019, 2018, and 2017 are the Social Security benefits. *Id.* at 32.

Creditor has filed Proof of Claim No. 2–1 stating that the secured claim was (\$126,635) as of the commencement of this case. That has increased due to the accruing interest (even at the “meager” 10% non-default rate) and recoverable costs for Movant due to Debtor’s inability to prosecute this case over the past seven months. If the Property sells for \$243,000, and if the court authorizes the employment of a real estate broker for the personal representative or the Chapter 7 trustee, after allowing 8% for costs of sale, that would generate net sales proceeds of \$223,500 (this assumes that Debtor is current on the property taxes and there would not be a significant amount to be paid from the gross sales proceeds through the closing escrow).

From the \$223,500, if Movant’s claim has increased to (\$135,000), Movant not providing that amount in the Motion and Mr. Anderson not testifying as to the total amount in his Declaration, that would leave \$88,000 in proceeds. Assuming reasonable Chapter 7 trustee fees and professionals as necessary to close the purported sale of less than \$6,000.00 (for which the court will have the Debtor expressly agree to being paid from any proceeds in which an exemption could be claimed to avoid an argument later of whether such proceeds could be “surcharged” or the court could sanction the Debtor such amounts to pay the necessary trustee fees and professionals to “save” some of the exempt amount for Debtor and not have it lost to the impending foreclosure sale), Debtor would still walk away with more than \$80,000 of proceeds in which he could claim an exemption as may legally be claimed under California law.

At the hearing, Debtor’s counsel addressed the court and that the Debtor has suffered a heart attack, has had treatment, and is to be released on November 10, 2020.

The court addressed with Debtor’s counsel the need to prosecute this case. Though he did not have authorization from his client, counsel stating that he had not been able to communicate with him due to the hospitalization, counsel said that conversion was “okay.” Given that for such conversion the Debtor would have to expressly consent to the Chapter 7 trustee fees and other expenses (such as trustee counsel) be paid from what would otherwise be exempt proceeds, the court did not have counsel also consent without client authorization to such.

The court continues the hearing to 1:30 p.m. on November 24, 2020, for a final hearing. As ordered from the bench, the Debtor shall get on file: (1) the motion to approve the employment of a broker, (2) a declaration of the real estate agent as to the status of the escrow (such as whether the contingency period has close, and if not what matters remain, and any she has been told of concerning “delays” in the lender processing and funding the loan), and (3) a declaration of the Debtor explaining where the monies have gone since June 2020 that he has been receiving from his tenant (\$500 a month) and from his significant other (\$942) who live the property for which the post-petition current mortgage payments are in default.

SUPPLEMENTAL DECLARATIONS AND EXHIBITS

Debtor filed a Declaration on November 17, 2020. Dckt. 130. Debtor asserts that an offer to purchase the home was accepted on October 16, 2020 for the purchase price of \$235,000.00. *Id.*, ¶ 3.

The expected closing date is December 5, 2020, provided that Debtor receive court approval of the sale. *Id.*, ¶ 6. Additionally, there is a back-up offer in place for \$235,000.00. *Id.* Upon review of the court's docket, a Motion to Sell Property has not been filed with the court.

In his Declaration, Debtor also testifies that after making the plan payments for May, June and July, the monies received since then have gone to pay for his truck (until his sister took over the payment on September), gas, food and household bills and expenses. *Id.*, ¶¶ 11, 17. Additionally, Debtor testifies that his sister Penelope moved out September 2020 and has not made any financial contributions since August; and his significant other's sister, Anna moved out in August and since then he has not collected any rental income. *Id.*, ¶¶ 12–13.

Debtor filed a Declaration of Cheree Hort, a Realtor for Lyon Real Estate in Support of Debtor's Opposition to Motion for Relief from Automatic Stay on November 17, 2020. Declaration, Dckt. 131. The Declaration provides that nine offers to purchase the property were received, the offer to purchase the home was accepted for the price of \$235,000.00, the expected closing date is December 5, 2020, and the Buyer has deposited \$4,000.00 into escrow. Declaration, Dckt. 131.

The court granted the Motion to Employ Cheree Hort of Lyon Real Estate as a Real Estate Agent for Debtor on November 20, 2020. Dckt. 143.

November 24, 2020 Hearing

On November 23, 2020, the Real Estate Agent employed by Debtor filed a supplement declaration. Dckt. 144. In it she testifies that on November 18, 2020, she was notified that the proposed sale of the Property for \$235,000 had fallen through. Though the purchaser was "pre-approved" for the loan of \$218,500 (a 93% loan to purchase price ratio).

The Real Estate Agent testifies that she was told the reason the pre-approved loan was denied was because the buyer "could not qualify for the loan based on his income." It is curious that a lender pre-approves a borrower without knowing the proposed borrower's income, or that it could be that the "income" information provided could not be documented as income that the proposed borrower actually received.

The Real Estate Agent contacted the back-up buyer and two other interested parties, but all three are already in contract to purchase other properties. The Property was put back on the market on November 21, 2020, and the Real Estate Agent had a showing scheduled for November 23, 2020.

In Debtor's Supplemental Declaration (Dckt. 130) in which he testifies that his sister has moved out, so he has lost the \$1,760.00 a month she was contributing to expenses. However, she is making his truck payment of \$752.32 a month. Debtor's significant other's sister has moved out and he is not receiving the \$500 a month in rent she was paying.

Debtor states that he receives \$942.00 a month in Social Security and that his significant other contributes her \$942.00 a month Social Security benefit to him.

At the hearing, the Trustee reported that Movant has received four payments under the Plan, which the court construes as some adequate protection.

Additionally, based on the evidence before the court (Debtor's schedules) there is a substantial equity cushion (approximately \$100,000) for Movant.

Debtor now has employed a Real Estate Agent with a well known local broker for the marketing and sale of the property. With the low interest rates, the real estate market has remained hot in the Sacramento Area, as shown by the other interested parties already being in contract to buy other properties.

The court, with the Movant's consent, continues the hearing to allow Debtor to actively market the Property. Additionally, Debtor's counsel and Movant's counsel can meet to address the issues relating to attorney's fees sought by Movant and some stated issues concerning to the loan documentation.

Motion to Sell

Debtor filed a Motion to Sell on December 17, 2020 and set for hearing on December 22, 2020. Dckt. 155. At the hearing, the motion to sell was granted and the property was sold for \$235,000 in cash, with a close date of January 6, 2021. Civil Minutes, Dckt. 179. The sale was made free and clear of Creditor Roger Anderson's lien (with the lien attaching to the proceeds) on the grounds that it appears that there is a *bona fide* dispute and Creditor can be forced to accept payment in full on its claim from the proceeds of sale. *Id.*

In the Order approving the sale, Debtor was instructed to file and serve an objection to claim on or before January 31, 2021. Order, Dckt. 180.

Trustee's Motion to Dismiss

Trustee filed a Motion to dismiss the case on November 10, 2020, which was set for hearing on January 6, 2020. Dckt. 123. Trustee sought dismissal on the grounds that Debtor was delinquent in plan payments and had failed to file a new plan after court sustained Trustee's objection to the prior plan. Civil Minutes, Dckt. 188. Debtor filed an amended plan on December 7, 2020 (Dckt. 151) and the parties filed Joint Stipulation to continue the hearing an available February 2021 date. *Id.* The court continued the hearing to March 3, 2021, Debtor appearing to be actively prosecuting the case with the filing of a new plan and the approved sale of the real property. *Id.*

Objection to Claim

Debtor filed an Objection to the claim of Creditor Roger Anderson on December 18, 2020 and set it for hearing on February 2, 2021. Dckt. 170. Debtor objects to Creditor's Proof of Claim #2 on the grounds that the claim fails to "sufficiently authenticate and substantiate the asserted balance and class of the underlying debt" pursuant to Federal Rule of Bankruptcy Procedure § 3001(c)(2) and as such sufficient questions have been raised to challenge the validity of the claim.

The relief requested in the non-adversary proceeding Objection to Claim is stated in the prayer in the Objection as follows:

22. the Debtor requests that the Court:

Sustain Debtor's Objection to the claim;

Order that RWA be denied the right to amend their Proof of Claim;

Order that said claim and any alleged lien be disallowed in its entirety;

Order that any alleged secured claim against Debtor's real property be determined to be void and of no effect; and/or

Order that the motion to sell Debtor's real property filed as F&F-7 be granted; and

Order that any claimed interest or costs subsequent to the sale be denied; and

Order that all post-petition attorney's fees and costs improperly demanded by RWA in violation of the Automatic Stay Restraining Order and without having been properly filed as an amended post-petition claim be denied in their entirety; and

Order that all pre-petition attorney's fees and costs be denied in their entirety; and

Order that RWA and/or its Counsel pay sanctions in the form of Debtor's reasonable attorney's fees and costs in bringing this Objection before this Court. Said fees and costs shall be determined by this Court upon a subsequent hearing to determine reasonableness.

Objection; p. 5:16-24, 6:1-7; Dckt. 170. The specific Bankruptcy Rules that appear relevant to the Objection and relief requested include Federal Rule of Civil Procedure 3007 and 7001(2).

In a Supplement to the Objection Debtor seeks further relief, stated as:

Wherefore, the Debtor requests that the Court:

Determine that **Sustain** Debtor's Objection to Claim #2;

Determine that Debtor is the prevailing party pursuant to California Civil Code §1717 and therefore Lender must pay Debtor's reasonable attorney's fees;

Order said claim and any allowed liens be disallowed in its entirety; or not allow more than the \$115,000.00 which has already been paid lender; or require Lender to comply fully with the requirements of Rule 300 I;

Order that any alleged secured claim against Debtor's real property or proceeds therefrom be determined to be void and of no effect; and

Order any claimed interest or costs subsequent to the sale be denied;

Order all pre-petition attorney's fees and costs demanded by Lender be denied in their entirety;

Order all post-petition attorney's fees and costs demanded by Lender be denied in their entirety;

Order Lender and/or Lender's Counsel pay sanctions in the form of Debtor's reasonable attorney's fees and costs in bringing this Objection before this Court. Said fees and costs shall be determined by this Court upon hearing to determine reasonableness.

Supplemental Objection, p. 3:1-16; Dckt. 182.

January 26, 2020 Hearing

At the hearing, **XXXXXXX**