

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 31, 2017, at 1:30 p.m.

1.	<u>15-27079-E-13</u> DBJ-2	LANNES SHARMAN Michael Hays	MOTION FOR RELIEF FROM AUTOMATIC STAY 12-19-16 [57]
MICHAEL HOLMES VS.			

No 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.

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 December 19, 2016. By the court's calculation, 43 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 XXXXXXXXXX.
--

Lannes Sharman ("Debtor") commenced this bankruptcy case on September 8, 2015. Michael Holmes and Linda Holmes ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 15071 *Pinon* Road, Magalia, California ("Property"). FN.1. Movant has provided the Declaration of Michael Holmes to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

FN.1. In the Motion the Address is stated to be 15071 *Pinon* Road, Magalia, California. The Notice of Hearing does not identify the property which is the subject of the Motion. Dckt. 58. In reviewing the

exhibits in support of the Motion, the address is identified as 15071 *Pinon* Road, Magalia, California. Dckt. 60.

However, on the Bankruptcy Petition Debtor lists the address as 15071 *Pinion* Road Magalia, California. Dckt. 1 at 1. Schedule A also lists the road name as *Pinion* Road.

At the hearing, the parties addressed the property identification as **XXXXXXXXXXXXXXXXXXXX**.

The Holmes Declaration states that the Deed of Trust requires the Debtor to make all real estate tax payments on the property and to keep the property properly insured. It states that the Debtor is in default of his obligation under the Note for failure to make the real estate tax payments and for failure to properly insure the premises. *See Exhibits C & D.* The Holmes Declaration also mentions that default notices have been sent to the Debtor but have been ignored allegedly.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee ("Trustee"), filed a Response on January 13, 2017. Dckt. 63. Debtor is delinquent \$789.00 under the plan confirmed November 11, 2015, for which the Movant is included in Class 1. Debtor has paid a total of \$11,046.00 to date. The Trustee has disbursed \$8,350.58 in Monthly Contract Installments, which is delinquent one month by \$596.47. The Movant's claim (#2) claimed \$6,178.13 in arrears, and the Trustee has disbursed \$309.50 towards it.

DEBTOR'S RESPONSE

Debtor filed a Response on January 17, 2017. Dckt. 66. Debtor is attempting to obtain financing for a new loan with the assistance of a family member to pay all that is owed in full to Movant. Debtor asks for sixty days to complete this task. Debtor believes if successful in obtaining a new loan with a cosigner, the Chapter 13 proceeding can be converted to a Chapter 7 case for which he was previously eligible.

DISCUSSION

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 \$69,579.42, as stated on Schedule D. The value of the Property is determined to be \$69,259.00, as stated in Schedules A and D.

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 failure to maintain insurance on the property and failure to pay all real estate taxes. *In re Lake Tahoe Partners, LLC*, No. 16-10150, 2016 Bankr. LEXIS 1806 (Bankr. N.D. Cal. Apr. 21, 2016) (stating that a well-recognized basis for relief from stay arises when the value of the property is not sufficient to pay both taxes and the debt

to a creditor); *see also Palacios v. Upside Investments LP (In re Palacios)*, No. CC-12-1502-KiPaTa, 2013 WL 1615790, at *3 (B.A.P. 9th Cir. Apr. 15, 2013) (citing *Delaney-Morin v. Day (In re Delaney-Morin)*, 304 B.R. 365, 370 n.3 (B.A.P. 9th Cir. 2003)) (stating that a debtor's failure to insure property can be a basis to grant a secured creditor relief from stay under § 362(d)(1) for lack of adequate protection of its collateral).

Movant's contention that the mere lack of equity is "cause," as set forth in 11 U.S.C. § 362(d)(1) is without merit. Lack of equity is one of the two necessary elements for relief from the automatic stay under 11 U.S.C. § 362(d)(2). The fact that the debtor has no equity in the estate is not sufficient standing alone to grant relief from the automatic stay under 11 U.S.C. § 362(d)(1). *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984); *In re Suter*, 10 B.R. 471, 472 (Bankr. E.D. Penn. 1981). Moving party has not adequately pleaded or provided an evidentiary basis for granting relief for "cause" on this ground.

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988). Based upon the evidence submitted to the court, and no discussion of this ground being presented in Debtor's Opposition or Trustee's Response, 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.

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.

Because Movant has established that there is no equity in the Property for Debtor and no value in excess of the amount of Movant's claims as of the commencement of this case, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 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 Michael Holmes and Linda Holmes (“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 Michael Holmes and Linda Holmes , 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 that 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 to obtain possession of the real property commonly known as 15071 ~~Pinon Road~~, Magalia, California.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

IT IS FURTHER ORDERED that the Movant having established that the value of the Property subject to its lien not having a value greater than the obligation secured, the moving party is not awarded attorneys’ fees as part of Movant’s secured claim for all matters relating to this Motion.

No other or additional relief is granted.