

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

February 28, 2023 at 1:30 p.m.

1. <u>22-21515</u> -E-13 <u>JCW</u> -1	MICHAEL/SUSAN COFFMAN Julius Cherry	MOTION FOR RELIEF FROM AUTOMATIC STAY 1-17-23 <u>[39]</u>
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WELLS FARGO BANK, N.A. VS.

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, and Chapter 13 Trustee on January 17, 2023. By the court’s calculation, 42 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 granted.
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Wells Fargo Bank, N.A. (“Movant”) seeks relief from the automatic stay with respect to Michael Allen Coffman and Susan Carol Coffman’s (“Debtor”) real property commonly known as 2857 Rolls Court, Cameron Park, California (“Property”). Movant has provided the Declaration of Charice Gladden to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made four post-petition payments, with a total of \$4,443.72 in post-petition payments past due. Declaration, Dckt. 41.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on February 14, 2023. Dckt. 55. Debtor claims Movant is adequately protected in the property, with \$269,000.00 in equity. Debtor requests a year to make up their missed mortgage payments.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$137,388.33 (Declaration, Dckt. 41), while the value of the Property is determined to be \$408,900.00, as stated in Schedules A/B and D filed by Debtor.

Movant as a Class 4 Claim

Upon confirmation of a plan, the automatic stay of 11 U.S.C. § 362(a) is modified, not terminated, for Class 4 claims. The modification is for the limited purpose, "to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract." The automatic stay exists, but it is modified.

Under Debtor's Confirmed Plan, Dckt. 6, Movant is to be treated as a Class 4 Claim. Debtor is to pay Movant a monthly installment of \$1,140.00 per month, under the terms of the underlying contract. Plan § 3.11(a), Dckt. 6. Thus, the stay is already modified to allow Movant to exercise its rights in the event of a default.

Movant is requesting relief pursuant to 11 U.S.C. § 362(d)(1). Pursuant to the confirmed Plan, however, the stay has already been modified to allow Movant to exercise their rights. The court recognizes that Movant may need an order specifying the continuing effect and modification of an automatic stay when state recording and filing law come into play, as well as for title insurance purposes. Seeking a separate order clearly specifying the scope of the relief granted in the Plan is not inappropriate.

The court shall issue an order confirming the automatic stay is modified 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.

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 Wells Fargo Bank, N.A. (“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 modified for Movant as the holder of a Class 4 Claim (confirmed Chapter 13 Plan, ¶¶ 3.10, 3.11; Dckt. 6) to allow Movant, 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 real property commonly known as 2857 Rolls Court, Cameron Park, California (“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 Property.

No other or additional relief is granted.

2 thru 3 [§ 362(d)(2) annul relief]

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.

The Order Setting the Hearing on Debtor's Motion to Dismiss was served by the Clerk of the Court on Debtor (*pro se*) and Chapter 13 Trustee as stated on the Certificate of Service on January 31 and February 1, 2023. The court computes that 27 and 28 days' notice has been provided.

The Motion to Dismiss is XXXXXXXXXXXX

On January 18, 2022, Debtor Nohemi Barron filed a Motion for the Voluntary Dismissal of this Bankruptcy Case. Motion; Dckt. 24. Debtor requests her almost absolute right to dismiss this case because Debtor will not be able to make the monthly plan payments, her family having withdrawn their financial support. *Id.*

This is Debtor's second Chapter 13 case filed in the past twelve (12) months. Her prior case, 22-22881, was filed on November 7, 2022, and dismissed on November 28, 2022. 22-22881; Order Dismissing For Failure to File Documents, Dckt. 13.

On January 26, 2023, (which is within the 10-day period that the court holds debtor motions to dismiss Chapter 13 cases), a Motion to Annul the Automatic Stay was filed by Tim Taggart, Trustee of the BLT Trust (Creditor). Motion; Dckt. 29. Creditor seeks to annul the stay with respect to a non-judicial foreclosure sale that was conducted on November 29, 2022. That Motion is now pending with the court, with the hearing set for February 28, 2023.

The court also notes that if this case is dismissed, then pursuant to 11 U.S.C. § 362(c)(4), in any further bankruptcy case filed prior to November 28, 2023, the automatic stay will not "automatically go into effect," but Debtor will have to file a motion for the court to make the stay effective in the subsequent case.

February 28, 2023 Hearing

At the hearing, XXXXXXXXXXXX

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 to Dismiss 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 to Dismiss is **xxxxxxx**

TIM TAGGART, TRUSTEE OF THE
BLT TRUST VS.

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Chapter 13 Trustee on January 26, 2023. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The court notes, Movant also indicates service to a "Rhonda Walker," as Debtor's Attorney. However, there is no filing to indicate Debtor is represented by an attorney.

NO OFFICIAL CERTIFICATE OF SERVICE SHEET USED

Though notice was provided, Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to insure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c).

At the hearing, **XXXXXXX**

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). 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 and other parties in interest 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 granted.
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Tim Taggart, Trustee of the BLT Trust (“Movant”) seeks relief from the automatic stay with respect to Nohemi B Barron’s (“Debtor”) real property commonly known as 171 West C Street, Galt, California (“Property”). Movant has provided the Declaration of Julie Taberdo to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made one post-petition payments, with a total of \$5,695.53 in post-petition payments past due. Movant’s Information Sheet, Dckt. 31. Movant also provides evidence that there are seven pre-petition payments in default, with a pre-petition arrearage of \$39,868.71. *Id.*

Movant requests annulment of the stay to effectuate a foreclosure sale that occurred on the Property on November 29, 2023, the date of the bankruptcy filing. Additionally, Movant requests either terminating or confirming no stay, as to the Debtor and Debtor’s bankruptcy estate. Movant notes, this is Debtor’s second bankruptcy pending within the prior year. Under 11 U.S.C. § 362(c)(3), the automatic stay terminates as to the debtor on the 30th day after the filing for bankruptcy.

CHAPTER 13 TRUSTEE’S RESPONSE

David Cusick (“the Chapter 13 Trustee”) filed a Response on February 13, 2023. Dckt. 37. Trustee asserts that Debtor has paid \$0.00 to the Trustee to date. Debtor is delinquent \$2,700.00 in Plan payments. Trustee requests the Motion be granted.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$416,361.04 (Movant’s Information Sheet, Dckt. 31), while the value of the Property is determined to be \$527,000.00, as stated in Schedules A/B and D filed by Debtor.

Annulment of Stay

As is well established in the Ninth Circuit, an act taken in violation of the automatic stay is void, not merely voidable. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001); (*In re Schwartz*), 954 F.2d 569, 571 (9th Cir. 1992).

Congress provides for the court to annul the automatic stay so as to render what was void to not be void. However, retroactive annulment of the automatic stay is within the discretion of the court. *Nat’l Env’tl. Waste Corp. v. City of Riverside (In re Nat’l Env’tl. Waste Corp.)*, 129 F.3d 1052, 1054 (9th Cir. 1997). The court, in making a case-by-case review, must balance the equities to determine if annulment is justified. *Id.* at 1055. Though not dispositive, most courts consider two factors: "(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." *Id.*

In re Fjeldsted, the bankruptcy Appellate Panel for the Ninth Circuit expanded the factors a court may consider when deciding whether to annul the stay: the number of times a debtor has filed a petition; the extent of any prejudice, including to a bona fide purchaser; the debtor’s overall good faith; the debtor’s compliance with the Code; how quickly the creditor moved for annulment; and how quickly the debtor moved to set aside the action which occurred. *In re Fjeldsted*, 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003).

The court reviews the various framework of factors and states how they apply in this Motion as follows:

Nat'l Env'tl. Waste Corp Factors

- (1) Whether the creditor was aware of the bankruptcy petition;

Movant states the petition was filed on November 29, 2022 at 10:15 a.m. Declaration, Dckt. 32 at ¶ 4. The foreclosure proceeding occurred on November 29, 2022 at 1:30 p.m. *Id.* Movant had no notice of the petition until November 20, 2022 at 2:57 p.m. *Id.*

- (2) Whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor.

The evidence as it stands shows Movant would be prejudiced if the stay is not annulled. Movant had already postponed their original sale due to Debtor's prior bankruptcy case and stay in place. Once Debtor's prior case was dismissed, Movant proceeded with the sale on November 29, 2022, having no notice of the new filing. Movant had already conducted a foreclosure sale in good faith. Movant conducted the sale with their due diligence to ensure they were not impeding on the Debtor's rights. There is no evidence that Debtor provided Movant notice that they had or would be filing a new bankruptcy case prior to the foreclosure sale.

To not annul the stay would cause the Movant to be harmed as they relied on the assumption the sale was legally binding and proper to purchase the property.

In Re Fjeldsted Factors

Under the *In re Fjeldsted* factors, the Panel looked at refining and providing further guidance to the court as to factors that may apply. Relevant factors here include:

- A. Whether creditors knew of the stay but nonetheless took action, thus compounding the problem;

Reiterating the foregoing, Movant was unaware of the bankruptcy. Movant did not receive notice of the bankruptcy case until after the foreclosure sale, on November 30, 2022. Additionally, the Bankruptcy was filed hours before foreclosure sale, giving little time to receive notice. Movant has taken no further action since receiving notice, including recording the foreclosure deed.

- B. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violating conduct;

Movant states they waited to see if Debtor would propose a viable Plan. After Debtor filed their Plan, Movant began preparing this Motion. This Motion was filed roughly two months after the violating conduct. The court finds Movant acted with reasonable pace.

- C. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;

Movant has taken no further action regarding the sale since receiving notice of the bankruptcy case. Therefore, Movant has not continued to act in violation of the stay.

D. Whether annulment of the stay will cause irreparable injury to the debtor;

There is no showing that annulling the stay will cause irreparable injury to the Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (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 defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

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.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests 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 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 granted.

Request for Prospective Injunctive Relief

Movant makes an **additional request stated in the prayer**, for which no grounds are clearly stated in the Motion. Movant’s further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. Though stated in the prayer, no grounds are stated in the Motion for

grounds for such relief from the stay. The Motion presumes that conversion of the bankruptcy case will be reimposed if this case were converted to one under another Chapter.

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, the legal points and authorities for such heretofore unknown nascent stay is necessary.

As noted by another bankruptcy judge, such request (unsupported by any grounds or legal authority) for relief of a future stay in the same bankruptcy case:

[A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.

Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

In re Van Ness, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the “silly” request for unnecessary relief may well be ultimately deemed an admission by Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

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 Tim Taggart, Trustee of the BLT Trust (“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 annulled and vacated effective as of the commencement of this bankruptcy case to continue to allow Movant, its agents, representatives, and successors, against the real property commonly known as 171 West C Street, Galt, California (“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 Property.

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

No other or additional relief is granted.