

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

March 21, 2017, at 1:30 p.m.

1. **16-23016-E-13** **PATRICIA/DAVID MILLS** **MOTION FOR RELIEF FROM**
ASW-1 **Michael Hays** **AUTOMATIC STAY**
 2-9-17 [26]
COLONIAL SAVINGS, F.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 February 9, 2017. By the court's calculation, 40 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.

<p>The Motion for Relief from the Automatic Stay is granted.</p>

Patricia Mills and David Mills ("Debtor") commenced this bankruptcy case on May 9, 2016. Colonial Savings, F.A. ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2357 Oro Quincy Highway, Oroville, California ("Property"). Movant has provided the Declaration of Jane Larkin to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Larkin Declaration states that there are four post-petition defaults in the payments on the obligation secured by the Property, with a total of \$2,096.24 in post-petition payments past due.

March 21, 2017, at 1:30 p.m.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on March 6, 2017. Dckt. 32. The Trustee does not oppose the Motion regarding the first deed of trust for the Property because Debtor's Plan provides for Movant as a Class 4 secured claim to be paid directly by Debtor.

DEBTOR'S RESPONSE

Debtor filed a Response through counsel on March 7, 2017. Dckt. 34. Debtor's counsel claims to have received money orders from Debtor in the total amount of \$1,050.00 that were forwarded to Movant as partial payment. Debtor hopes to be able to cure the remaining deficiency and additional amounts that have come due before the hearing. Debtor requests that the Motion be denied and that attorneys' fees be awarded.

Unfortunately for Debtor, a promise to pay is not evidence of such.

DISCUSSION

The Larkin Declaration states that the outstanding balance owed to Movant as of February 2, 2017, is \$56,107.20. Dckt. 28. Schedule D (filed on May 12, 2016) lists \$56,374.70 owed on the Property to Movant, and it does not list any other secured claim against the Property. Dckt. 11. 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 \$56,107.20 (including \$56,107.20 secured by Movant's first deed of trust), as stated in the Larkin Declaration. The value of the Property is determined to be \$110,000.00, as stated in Schedules A and D.

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.

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 Colonial Savings, F.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 vacated to allow Colonial Savings, F.A., 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 2357 Oro Quincy Highway, Oroville, 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.

No other or additional relief is granted.

HSBC BANK USA, 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.

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 January 6, 2017. By the court's calculation, 39 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). 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. .

<p>The Motion for Relief from the Automatic Stay is granted.</p>

Avelino Santos, Jr. ("Debtor") commenced this bankruptcy case on August 17, 2016. HSBC Bank USA, N.A., as Trustee on Behalf of Ace Securities Corp. Home Equity Loan Trust and for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2006-HE4, Asset Backed Pass-Through Certificates ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 912 Sapphire Circle, Vacaville, California ("Property"). Movant has provided the Declaration of Shilundra Lidell to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Filing of Exhibits and Declaration as Separate Documents

Movant filed the Exhibits and Declaration in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules,

as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

This also raises another evidentiary question. The Declaration is not being filed as a “declaration,” written testimony provided by a witness with personal knowledge or as an expert (Fed. R. Evid. 601 et seq.), but as a written document (Fed. R. Evid. 901 et seq.). The court can envision a number of situations in which a party may provide the court with an exhibit which is the declaration filed in another proceeding or case as a document not presented for the statements made therein.

Counsel may assert that “it is obvious” to anyone looking at the file that we intend to present this declaration as testimony in support of the motion. Further, counsel may be asserting that “it is really, really easy for the court to dig through the exhibits, find the declaration, analyze the declaration, make the determination that Movant really intends this to be testimony and not a written document filed as an exhibit, recast the exhibit as testimony, and if it really bothers the court that much, then the court can just extract the declaration exhibit and refile it for Movant as a declaration—if it really bothers the court that much.” The response to such rationalization is no, the court does not draft, recast, and make the litigation decision as to what documents and evidence should be filed. Further, if it is that easy, then Movant and counsel can do it right from the start and properly file the declaration as a separate exhibit.

Finally, it is not “obvious” that Movant has filed a declaration as testimony in support of the Motion. A review of the docket shows that Movant has filed a motion, points and authorities, exhibits, notice, and relief from stay information sheet—on its face it shows that Movant did not file and is not offering a declaration in support of the Motion.

Review of Declaration

The Declaration (Exhibit 4, p. 33–35; Dckt. 94) is given by Shilundra Lidell, an employee of Ocwen Loan Servicing, LLC, the loan servicer for the creditor. The testimony includes information obtained from the books and records maintained by Ocwen Loan Servicing, LLC in the course of its business as a loan servicer. The Shilundra Lidell Declaration states that there are three post-petition defaults in the payments on the obligation secured by the Property, with a total of \$4,587.96 in post-petition payments past due.

Declarant further testifies that the unpaid principal on the obligation secured by the deed of trust was \$229,479.24 as of November 22, 2016.

Attached as an exhibit to the declaration which is filed as an exhibit is a chart of the post-petition defaults in payments.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 30, 2017. Dckt. 98. The Trustee notes that while a plan has not been confirmed, Movant has been provided for in Class 3 of a proposed plan with the Property to be surrendered. The Trustee states that Debtor is delinquent under the proposed plan in the amount of \$1,262.00, having paid \$5,120.00 so far.

FEBRUARY 28, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on March 21, 2017. Dckt. 107.

DISCUSSION

The Motion seeks relief based on two grounds. First, Movant's interests in the Property are not adequately protected, and relief should be granted pursuant to 11 U.S.C. § 362(d)(1). To support this, Movant asserts that the three post-petition defaults in payments (totaling \$4,587.96) are sufficient to establish the lack of adequate protection. Alternatively, it is asserted that there is not a sufficient equity cushion to protect Movant's interests. Movant computes the lack of an equity cushion as follows:

FMV of Property.....	\$393,000.00
Obligation Owed Movant.....	(\$232,887.03)
Costs of Sale (8%).....	<u>(\$ 32,000.00)</u> (rounded up by Court)

Equity Cushion Computed Using Movant's Numbers.....\$160,112 (69% in excess of Movant Claim).

To be fair, in the Motion Movant asserts that the equity cushion is only \$7,752.97. Motion, ¶ 2; Dckt. 92. However, to get there, Movant has to deduct from the value of the property the obligation owed to the creditor who Movant asserts holds a junior lien against the Property.

For the court to accept this calculation, then the court also has to accept as an admission by Movant that its lien is junior to that of Franklin Management Credit Corporation and that Franklin Management is paid first from the proceeds of any sale of the Property.

Alternative Grounds for Relief

Movant also asserts that relief is properly allowed pursuant to 11 U.S.C. § 362(d)(2)—no equity in the Property for the Debtor or estate, and the property is not necessary for any effective reorganization. As to the equity, Movant alleges that after payment of the obligations secured by the Property there is \$39,000 of equity in the Property (FMV of \$393,000.00 minus secured claims totaling (\$352,887)). Motion, ¶ 2; *Id.*

With respect to “necessary for an effective reorganization,” Movant fails to assert any allegations for this component. All Movant “alleges” in the Motion is that “Pursuant to 11 U.S.C. §362(d)(2), the debtors have little or no equity in the Property and the Property is not necessary for an effective

reorganization.” *Id.* The court’s review of 11 U.S.C. § 362(d)(2) shows that the Code Section does not state that the Property in this case is not necessary for an effective reorganization in this case. Rather, it merely states the statutory requirements for the granting of such relief. On its face, the Motion does not appear to allege that: (1) there is not equity in the property, and (2) the Property is not necessary for an effective reorganization.

Chapter 13 Trustee Statement of Non-Opposition

It appears that the Chapter 13 Trustee may have ridden to the rescue of Movant in this Contested Matter. The Chapter 13 Trustee directs the court to Debtor’s proposed Chapter 13 Plan filed in this case. Second Amended Plan, Dckt. 89. In the Plan the Debtor provides for the two claims secured by the Property by the surrender of the Property—granting the creditors relief from the automatic stay so that they may exercise their rights in the collateral, if they so choose.

This explains why Debtor has not filed an opposition to the Motion. The election of the Debtor to surrender the Property is cause to terminate the stay in this Chapter 13 case. Debtor has elected to give up on the Property, not try to save what equity may exist (taking into account the costs of sale and limited ability to fund a plan).

Granting Relief from Stay

From the evidence provided to the court and the Debtor electing to surrender the Property to allow the creditors to foreclose on their collateral, the court determines that cause exists to grant relief from the stay pursuant to 11 U.S.C. § 362(d)(1).

Request for Attorneys’ Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys’ fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys’ fees or having any obligation to pay attorneys’ fees. Based on the pleadings, the court would either: (1) have to award attorneys’ fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys’ fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

If grounds had been shown and evidence provided, the court could have easily made such determination and granted fees (assuming there is a contractual or statutory basis). If an amount of such fees had been included in the motion and prayer, the court and all parties in interest would fairly have been put on notice of the upper limit of such amounts, and the court could have taken the non-opposition and non-response as defaults.

While the court could consider the award of attorneys’ fees as a post-judgment motion (Fed. R. Civ. P. 52(b) and Fed. R. Bankr. P. 7052, 9014), the otherwise unnecessary cost and expense of Movant having to file a motion for an award of attorneys’ fees for the unopposed Motion in which it made reference to wanting attorneys’ fees would well exceed any attorneys’ fees that the court would award for a motion

such as this. Movant's strategic decision not to provide the court with grounds for and evidence of attorneys' fees has rendered it useless to proceed with a post-judgment motion that would cost more in unawarded (as in unnecessary and unreasonable fees) attorneys' fees.

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 HSBC Bank USA, N.A., as Trustee on Behalf of Ace Securities Corp. Home Equity Loan Trust and for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2006-HE4, Asset Backed Pass-Through Certificates ("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 HSBC Bank USA, N.A., as Trustee on Behalf of Ace Securities Corp. Home Equity Loan Trust and for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2006-HE4, Asset Backed Pass-Through Certificates, 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 912 Sapphire Circle, Vacaville, California.

No other or additional relief is granted.