

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Pursuant to District Court General Order 612, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through April 30, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

April 7, 2020 at 1:30 p.m.

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|----|---------------------------------------|------------------------|--|
| 1. | <u>18-21488</u> -E-13 | DANIEL/ALLISON BRENNAN | MOTION FOR RELIEF FROM |
| | <u>AP-3</u> | Charles Hastings | AUTOMATIC STAY AND/OR MOTION |
| | JPMORGAN CHASE BANK, | | FOR ADEQUATE PROTECTION |
| | NATIONAL ASSOCIATION VS. | | 3-10-20 [<u>167</u>] |

**TELEPHONIC APPEARANCE OF CHARLES HASTINGS
ATTORNEY FOR THE DEBTORS REQUIRED
FOR THE APRIL 7, 2020 HEARING**

**THE COURT SHALL ISSUE A SEPARATE ORDER
REQUIRING THE APPEARANCE OF COUNSEL AND
EACH OF THE TWO DEBTORS, IN PERSON, FOR
ALL FURTHER HEARINGS IN THIS BANKRUPTCY CASE**

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, creditors, and Office of the United States Trustee on March 10, 2020. By the court's calculation, 28 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 in the form of an adequate protection order to allow Movant to protect its financial interests.

JP Morgan Chase Bank, National Association ("Movant") seeks relief from the automatic stay with respect to Daniel Lawrence Brennan and Allison Lyn Brennan's ("Debtor") real property commonly known as 11840 Gidaro Dr., Elk Grove, California ("Property"). Movant has provided the Declaration of Lauren Green to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on March 24, 2020. Dckt. 175. Trustee asserts that Debtor's confirmed Plan provides for Chase Mortgage as a Class 4 creditor with Debtor making payments directly.

REVIEW OF THE MOTION

The Motion requests pursuant to 11 U.S.C. § 362(d) for an order of adequate protection, or in the alternative confirming termination of the automatic stay of 11 U.S.C. § 362(a) as it applies to Movant and the real property located at 11840 Gidaro Dr, Elk Grove, California.

Debtor executed a Note in the principal sum of \$787,500.00 which was made payable to Chase Bank USA, N.A. The Deed of Trust was assigned to Movant on May 21, 2014 and recorded with the Sacramento County Recorder on June 4, 2014. Exhibit 3, at 26. Debtor's Fourth Modified Plan provides for Movant's Claim as a Class 4 Claim. The Plan states that Debtors will sell the Property no later than April 30, 2020, and proceeds will be used to satisfy all secured claims.

Movant asserts that the loan is not escrowed for taxes and Debtors are primarily responsible for the maintenance of the tax obligations with regards to the Property. According to Movant, the Deed of Trust provides that Debtor "shall pay taxes, assessments, charges, fines and impositions attributable to the Property which can attain priority over this Security Instrument . . ." A review of Exhibit 2, the Deed

of Trust, shows under Section 4 that indeed Debtor is to pay the different fees previously listed. Exhibit 2, at 14. Dckt. 170.

Thus, Movant seeks relief from the automatic stay on the basis that Debtor has failed to pay the following property taxes due (including penalty and delinquent costs): 2nd installment for 2017/2018 in the amount of \$10,235.23; the 1st and 2nd installments for 2018/2019 in the amount of \$18,291.04; and the 1st installment for 2019/2020 in the amount of \$8,376.73, for a total of \$36,903.00 ("Property Taxes"). Declaration, Dckt. 171.

Movant provides evidence that there are four (4) tax payments in default by presenting the Declaration of Lauren Green. *Id.* Under penalty of perjury, declarant testifies that Movant received notice that the Debtors had failed to maintain the property taxes due. Interestingly, the notices themselves are not provided as evidence of said payment default.

Prayer for Relief:

1. Requiring Debtors to pay the outstanding Property Taxes owing on the Property within fourteen (14) days of the entry of an order granting this Motion, or alternatively;
2. Permitting the Movant to pay the outstanding Property Taxes, and file a Supplemental Proof of Claim to be paid through the Chapter 13 Plan, or alternatively;
3. For an order confirming that the failure to pay the taxes is a default under the applicable contract, such that the automatic stay of 11 U.S.C. § 362(a) and co-debtor stay of 11 U.S.C. § 1301(a) are terminated to allow Movant to exercise its rights against any collateral and any non-debtor pursuant to Section 3.11(a) of the Confirmed Plan.
4. Granting Movant such other and further relief as the court deems just and proper.

Motion, at 3-4.

DEBTOR'S RESPONSE

On March 24, 2020, Debtor filed a Response stating the following:

- A. There is no dispute that there is significant equity in the property;
- B. There is no claim Debtor is in default of the monthly mortgage payment;
- C. Movant's sole claim is the outstanding property taxes;
- D. Debtor's Plan provides that Movant will be paid in full;
- E. The Property is currently on the market for sale;

- F. The sale proceeds will be applied towards satisfaction of the secured claims and all associated property expenses, including the delinquent property taxes complained of;
- G. Debtor consents to the Court granting Movant's request to allow Movant to pay the delinquent property taxes and supplement its secured claim to be paid through the Plan;
- H. The estimated \$300,000.00 in equity provides adequate protection, and will be applied to cure all tax defaults, mortgage payments, and all other secured claims set forth in the Plan.

Response, Dckt. 177.

Debtor offers no testimony in opposition, only the arguments of Debtor's counsel. No argument is provided as to where the \$36,903.00 in property tax monies have gone since the time the second installment for the 2017/2018 tax year case due (which would be April 2018). Debtor does not dispute not having made any property tax payments since commencing this case in March 2018.

Review of Debtor's Income and Expense Information

In looking through the file, the most recent income and expense information the court could readily locate is that from the original Schedules I and J filed in this case. Dckt. 1 at 30-31 and 32-33. Debtor confirmed the Plans in this case upon stating under penalty of perjury to the court that they have \$29,920 a month in net income from their business. *Id.* at 30-31. From this, Debtor reports having (\$24,891) in expenses, which includes (\$9,500) a month for estimated taxes, (\$5,985.57) for payment of Movant's monthly installment on its secured claim, and (\$1,333.33) for property taxes and insurance.

It is unclear as to why Debtor could not, in the good faith prosecution of this case and the various Chapter 13 Plans, and consistent with the financial information provided under penalty of perjury, make any property tax payments since this case was commenced in 2018.

11 U.S.C. § 361: ADEQUATE PROTECTION

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by

- (1) requiring the trustee to make a cash payment or periodic cash payments, to the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property;
- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
- (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will

result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. §361.

Here, Movant filed a Proof of Claim in the amount of \$725,003.24. Proof of Claim 4-1. While the value of the Property is determined to be \$1,000,000.00, as stated in Schedules B and D filed by Debtor, the equity cushion in the Property for Movant's claim provides adequate protection. Debtor is not in default of the mortgage payments.

The court turns to Movant's argument for adequate protection as it pertains specifically to the property taxes. Debtor has failed to pay the property taxes due per the Note.

As previously pointed out, there is significant equity in the Property. If the sale goes through, and the purchase price is as close to the \$1,000,000.00 value as possible, Movant's claim for the principal and for the property taxes will be paid in full.

However, Movant gives this court, and thus Debtor, the option of Movant paying the property taxes due, provided that Movant is allowed to file a Supplemental Proof of Claim to be paid through the Chapter 13 Plan. Debtor consents to this request.

Thus, the court finds that Movant paying for the property taxes and filing a Supplemental Proof of Claim is the proper solution, at least in the short run. Movant is entitled to adequate protection pursuant to 11 U.S.C. § 361 and allowed to pay the property taxes due and file a Supplemental Proof of Claim in the amount of property taxes due.

11 U.S.C. § 362(d)(1): FOR CAUSE

As to Movant's request that the court, in the alternative, terminate the stay as to Debtor and co-debtor, that request is denied.

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 does not exist for terminating the automatic stay. 11 U.S.C. § 362(d)(1).

Here, again, there is no doubt that there is significant equity in the Property. Moreover, Debtor is not in default of the mortgage payments for Movant's Class 4 claim. Debtor's Plan provides

for Movant to be paid in full. Debtor's Motion to Employ a Real Estate Agent was granted on January 28, 2020. Dckt. 164. Debtor has listed the property for \$1,250,000.00. Exhibit 1, Dckt. 152. Compared to the Note debt of \$725,003.24, to terminate the stay for the property taxes due in the amount of \$36,903.00 at the time that Debtor is preparing for the sale of the Property would not serve for the proper completion of the case.

REVIEW OF DEBTOR'S FOURTH MODIFIED PLAN

This Bankruptcy Case was filed on March 14, 2018. The first Chapter 13 plan confirmed in this case was Debtor's Second Amended Plan, confirmed by an order filed on February 6, 2019. The terms of that Plan, as amended at the confirmation hearing and stated in the Confirmation Order, provided that if the Debtor had not sold the Property by July 1, 2019, Debtor will file an amended plan that surrenders the Property or provides for full payment of Movant's arrearages. Order, Dckt. 127.

On April 30, 2019, two months after confirmation of the Second Amended Plan, Debtor filed a Third Modified Plan. Dckt. 129. The court confirmed the Final Third Modified Plan (Dckt. 146) by an order filed on July 2, 2019 (Dckt. 147). This Final Third Modified Plan required a lump sum payment from the sale of the Property by the eighteenth month of the Plan (September 2019). However, the Additional Provisions also state that Debtor will sell the Property no later than December 31, 2019. Dckt. 146 at 8.

On December 3, 2019, Debtor filed a Fourth Modified Chapter 13 Plan. Dckt. 156. The court entered an order confirming the Fourth Modified Chapter 13 Plan on March 11, 2020. Dckt. 174. The Fourth Modified Plan requires that the Property be sold no later than April 30, 2020. Unfortunately, given the social and economic upheaval resulting from the COVID-19 pandemic, such sale appears unlikely (and there being no motion for order authorizing sale on file).

Thus, the Debtor, Movant, and the Chapter 13 Trustee, and their respective counsel will need to put their heads together to "figure out" how a sale of the Property can actually be completed. The Debtor has now missed three self-imposed deadlines.

At the hearing, counsel for the Debtor explained **XXXXXXXXXX**

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 JP Morgan Chase Bank, National Association ("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 Motion for Relief from the Automatic Stay is modified and as adequate protection under 11 U.S.C. § 361, Movant may advance additional monies to pay the delinquent Property Taxes in the amount of \$36,903.00, including additional penalties and costs that accrue, and file a

Supplemental Proof of Claim that reflects the increased amount due to Movant.

No further or additional relief is granted at this time, such being without prejudice to Movant seeking further relief.