

Eastern District of California

Sacramento, California

<p>1. <u>13-91315</u>-E-7 APPLEGATE JOHNSTON, INC. <u>15-9032</u> George Hollister MCGRANAHAN V. GRAYBAR ELECTRIC COMPANY, INC.</p>	<p>CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT FOR (1) AVOIDANCE OF PREFERENTIAL TRANSFERS; (2) RECOVERY OF AVOIDED TRANSFERS AND (3) OBJECTION TO CLAIM 7-13-15 [7]</p>
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Recovery of money/property - preference

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April 12, 2017, in which it states that a stipulation has been reached, and it and the accompanying documents should be filed by April 14, 2017. Dckt. 52.

At the Pretrial Conference, the parties reported that **XXXXXXXXXXXXXXXXXXXX**.

MARCH 23, 2017 PRETRIAL CONFERENCE

A review of the docket does not reveal a statement of stipulated facts. At the Pretrial Conference, the parties reported that they are continuing to resolve the stipulated facts and exhibits, and should have it resolved within a week.

The court continued the pretrial conference to 1:30 p.m. on April 18, 2017, specially set in the Sacramento Courthouse, Dept. E.

SUMMARY OF COMPLAINT

The Plaintiff-Trustee alleges that Defendant Graybar Electric Company, Inc. received payments totaling \$246,762.09 within ninety days of the commencement of the Debtor's bankruptcy case. It is asserted that this transfer may be avoided pursuant to 11 U.S.C. 547 and recovered by the estate as provided in 11 U.S.C. § 550. The Plaintiff-Trustee also includes a Third Cause of Action objection to Proof of Claim No. 75-1 filed by Defendant.

SUMMARY OF ANSWER

An Answer to the Amended Complaint was filed on September 2, 2015. In the Answer, the Defendant admits the allegations of federal jurisdiction. Answer 3, Dckt. 11.

With respect to this Adversary Proceeding for the avoidance of a preference pursuant to 11 U.S.C. § 547, Defendants do not admit that this is a core proceeding, and also do not consent to the bankruptcy judge entering order or final judgment.

FINAL BANKRUPTCY COURT JUDGMENT

The Plaintiff alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O). Complaint 3, 4, Dckt. 1. At the hearing, Defendant Graybar Electric Company, Inc. stated on the record that it concurred with the allegations that the claims asserted under 11 U.S.C. §§ 547 and 550 in the Complaint are core matters. Further, to the extent that any issues in the existing Complaint in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

MARISELA GUZMAN-GRASSI VS.

Final Ruling: No appearance at the April 18, 2017 hearing is required.

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, Debtor’s Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 21, 2017. 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). 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.

Marisela Guzman-Grassi (“Movant”) seeks relief from the automatic stay to allow a dissolution proceeding between Movant and Ronald Grassi (“Debtor”), Case No. PFL20140061, El Dorado County Superior Court, (“State Court Litigation”) to be concluded. Movant has provided a declaration to introduce evidence to authenticate the documents upon which she bases the claim and the obligation owed by Debtor.

Movant’s Declaration states that Debtor scheduled two pensions that are subject to administration in the State Court Litigation. Schedule B lists a CalPERS pension valued at \$67,113.27 and an ICERS pension valued at \$49,401.27. Movant notes that Debtor has fully exempted both pensions, but she asserts that they are community property subject to the State Court Litigation.

TRUSTEE’S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on April 4, 2017. Dckt. 82. The Trustee states that Debtor is current on plan payments, Debtor has not listed Movant in the Plan, and Movant has not filed a claim in this case.

DISCUSSION

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The moving party bears the burden of establishing a prima facie case that relief from the automatic stay is warranted, however. *LaPierre v. Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.)*, No. EC-16-1087, 2016 Bankr. LEXIS 2205, at *8–9 (B.A.P. 9th Cir. May 23, 2016). To determine “whether cause exists to allow litigation to proceed in another forum, ‘the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate.’” *Id.* at *9 (quoting *Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.)*, No. CC-08-1056-DKMo, 2008 Bankr. LEXIS 4692, at *6 (B.A.P. 9th Cir. Aug. 15, 2008)) (citing *In re Aleris Int’l, Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011)). The basis for such relief under 11 U.S.C. § 362(d)(1) when there is pending litigation in another forum is predicated on factors of judicial economy, including whether the suit involves multiple parties or is ready for trial. *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Santa Clara Cty. Fair Ass’n v. Sanders (In re Santa Clara Cty. Fair Ass’n)*, 180 B.R. 564 (B.A.P. 9th Cir. 1995); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

Debtor listed Movant as a creditor on his original Master Address List of August 5, 2016. Dckt. 4. That list was amended on August 11, 2016, to add Wells Fargo Bank NA and to remove Movant. *See* Dckt. 12. No explanation has been provided regarding why Debtor removed Movant from the list of creditors. In fact, Debtor has not addressed, or opposed, the present Motion in any way. Debtor having fully exempted the two pensions, and the Trustee having not opposed those exemptions, the pensions would not be necessary for an effective rehabilitation. 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized).

The court finds that the nature of the State Court Litigation warrants relief from stay for cause. The pensions have been exempted fully, and they are subject to the State Court Litigation. Therefore, judicial economy dictates that the state court ruling be allowed to continue after the considerable time and resources put into the matter already.

The court shall issue an order modifying the automatic stay as it applies to Debtor to allow Movant to continue the State Court Litigation. The automatic stay is not modified with respect to enforcement of the judgment against Debtor, the Trustee, or property of the bankruptcy estate. Any judgment obtained shall be submitted to this court for the proper treatment of any claims arising under the Bankruptcy Code.

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 (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 Marisela Guzman-Grassi and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Marisela Guzman-Grassi 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 Marisela Guzman-Grassi (“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 as applicable to Ronald Grassi (“Debtor”) to allow Marisela Guzman-Grassi, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors to proceed with dissolution proceedings in Case No. PFL20140061, El Dorado County Superior Court.

IT IS FURTHER ORDERED that the automatic stay is not modified with respect to enforcement of any judgment against Debtor, the Trustee, or property of the bankruptcy estate. Any judgment obtained by Movant shall be submitted to this court for the proper treatment of any claims arising under the Bankruptcy Code.

No other or additional relief is granted.

3. [15-25098](#)-E-13 NESTOR ROCES
PPR-1 Paul Bains

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR ADEQUATE
PROTECTION
1-13-17 [\[91\]](#)

OLD REPUBLIC INSURANCE
COMPANY VS.

**THE HEARING ON THE MOTION FOR RELIEF SHALL BE
CONDUCTED AT 3:00 P.M. IN CONJUNCTION WITH THE MOTION
TO CONFIRM THE MODIFIED PLAN IN THIS BANKRUPTCY
CASE**

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 January 13, 2017. 28 days' notice is required. That requirement was met.

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.

Nestor Roces ("Debtor") commenced this bankruptcy case on June 25, 2015. Old Republic Insurance Company ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 8 Woodridge Place, Vallejo, California ("Property"). Movant has provided the Declaration of Martin Podorsky to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Podorsky Declaration states that there are 18 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$6,527.52 in post-petition payments past due.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on February 13, 2017. Dckt. 102. The Trustee asserts that the Debtor is current under confirmed plan. The Trustee also states that the Movant's secured claim of \$110,977.38 is not provided for in the Debtor's plan confirmed on January 24, 2016, which Movant filed on April 15, 2016. The Notice of Filed Claims entered on August 22, 2016 listed the creditor as secured, but not provided for by the plan. The Trustee has not made any disbursements to the Movant. The Trustee alleges that the Movant appears secured by real property that is Debtor's residence.

DEBTOR'S RESPONSE

Debtor filed a Response on February 14, 2017. Dckt. 105. Debtor will file a Modified Plan prior to the scheduled hearing on Movant's Motion for Relief which will account for Movant's claim. Debtor also promises to be current on plan payments on any Modified Plan that is filed. Debtor requests the Court continue Movant's Motion for Relief to April 18, 2017, which is the projected hearing date for confirmation of the Modified Plan Debtor is to file. Unfortunately for Debtor, a promise of action is not evidence of such.

FEBRUARY 28, 2017 HEARING

At the hearing, the court continued the matter to 1:30 p.m. on April 18, 2017. Dckt. 108.

APRIL 18, 2017 CONTINUED HEARING

No further pleadings have been filed with respect to this Motion for Relief (DCN: PPR-1).

The court notes that a number of other pleadings have been filed by Debtor since the February 28, 2017 Hearing. On March 7, 2017, Debtor filed an Amended Chapter 13 Plan (Dckt. 111), Motion to Confirm Modified Plan and supporting pleadings (Dckts. 109, 112, 114, 114), and Objection to Claim of Midland Credit Management (Dckt. 116).

On February 27, 2017, the Chapter 13 Trustee filed an Opposition to the Motion to Confirm Modified Plan. Dckt. 121. The Trustee's Opposition is first based on the amount of the monthly plan payment being insufficient to fund the Plan. The Trustee also objects in that the Plan improperly attempts to put a secured claim, for which the payments are in default, as a Class 4 Claim, not providing for the claim in the proposed Modified Plan.

The Trustee's Opposition continues, stating that the dividend for the Class 1 arrearage is insufficient, the Debtor has not provided any current financial information (this case now being two years old), and Debtor provides for a Class 5 post-petition tax obligation for which no proof of claim has been filed.

Motion to Approve Stipulation

On April 4, 2017, Creditor filed a Motion seeking an order approving a Stipulation with the Debtor. Dckt. 124. The Docket Control Number used for the Motion to Approve Stipulation is the same as

Debtor's Motion to Confirm Modified plan, PSB-001. The court notes that Creditor's counsel and Debtor's counsel have sought such an order as required by the Federal Rules of Bankruptcy Procedure, by motion (or application when permitted by the Bankruptcy Rules). Fed. R. Bankr. P. 9013.

A review of the Motion to Approve Stipulation discloses the following relief sought to be obtained through the Motion and order thereon:

- A. Creditor's Claim shall be "fully allowed."
- B. The fully allowed claim will be provided for as a Class 1 Claim.
- C. The pre-petition arrearage of \$24,450.80 shall accrue interest at 0% while the bankruptcy case is pending, the Plan shall provide for a minimum of \$100.00 a month payment on the arrearage, and Creditor and Debtor acknowledge that the arrearage shall not be completely cured through the Plan.
- D. The unpaid portion of the arrearage "will not be subject to any discharge order" and "will remain fully collectible after the discharge of Debtor and the conclusion of the case."
- E. Interest shall commence accruing (at an unstated rate) upon the closing of the bankruptcy case.
- F. The post-petition arrearage in the amount of \$7,252.80 shall be paid through the Plan, with monthly minimum payments of \$157.67.
- G. Commencing March 1, 2017, "ongoing amounts" of \$362.64 will resume and continue to be paid by the Trustee.
- H. Debtor is to confirm a plan with the above terms within sixty days of the date of the Stipulation (April 2, 2017, the last signatory to the Stipulation; Dckt. 125).
- I. Provisions for relief from the stay in the event of a default.
- J. The Chapter 13 Plan may not alter or modify the terms of the Stipulation.
- K. The Stipulation must be approved by the Bankruptcy Court.
- L. If Debtor sells the property securing Creditor's Claim prior to confirming the Plan, Creditor shall be paid in full on its claim.

A review of the Certificate of Service discloses that the Motion for Order Approving Stipulation was served only on Debtor, Debtor's Counsel, and the Chapter 13 Trustee. Nobody else has been served.

The court appreciates the significant efforts of Debtor, Creditor, Debtor's Counsel, and Creditor's Counsel in achieving agreed plan terms to allow Debtor to continue in the prosecution of this case and maintain ownership of the property securing Creditor's claim. That being said, it appears that this Stipulation is not a free floating compromise for which approval must be sought by a notice motion (on all parties in interest pursuant to Fed. R. Bankr. P. 9019), but is "merely" a stipulation for the terms that Debtor must propose for a modified plan to preclude Creditor opposing confirmation of such a modified plan.

The court cannot, and will not purport to, pre-confirm portions of a Chapter 13 plan through "stipulations" between a debtor and individual creditors. While not in this situation with these parties—having an order that pre-confirms the terms on deals which exist based on notice only between the debtor, creditor, and Chapter 13 Trustee, and cuts out all of the other parties in interest from the confirmation process—much mischief could be afoot.

The stipulation also appears to include a term which would be a waiver of the discharge of the arrearage portion of the claim. However, completion of the plan would result in a discharge for the balance of the secured claim. It is not clear what the parties intend with such an "unpaid arrearage will not be discharged" term as stated in the Motion.

In substance, substantially all of the terms in the "stipulation" are really plan terms which the court can "approve" and make binding only through confirmation of the plan.

The hearing on Debtor's Motion to Confirm the Modified Plan to which the terms stated in the Stipulation relate was conducted on the court's 3:00 p.m. April 18, 2017 Calendar. At that hearing, the proposed Modified Chapter 13 Plan was **XXXXXXXXXXXXXXXXXXXXXXXXXXXX**.

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 Old Republic Insurance Company ("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 **XXXXXXXXXXXXXXXXXXXX**.