

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

April 19, 2018, at 10:00 a.m.

1. [17-27377-E-7](#) MELISSA SMITH
JCW-1 Aubrey Jacobsen

**MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-16-18 [\[72\]](#)**

**SELECT PORTFOLIO SERVICING,
INC. 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 7 Trustee, on March 16, 2018. By the court's calculation, 34 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.

Deutsche Bank National Trust Company as trustee for Morgan Stanley ABS Capital I Inc. Trust 2004-HE6, Mortgage Pass-Through Certificates, Series 2004-HE6 in interest ("Movant") seeks relief from the automatic stay with respect to Melissa Lynn Smith dba Natural Healing and Therapy by Melissa ("Debtor") real property commonly known as 283 Ursula Drive, Sutter Creek, California ("Property"). Movant has provided the Declaration of Ethan Clark to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

April 19, 2018, at 10:00 a.m.

The Ethan Clark Declaration states that there are three post-petition defaults in the payments on the obligation secured by the Property, with a total of \$4,019.85 in post-petition payments past due. The Declaration also provides evidence that there are nineteen pre-petition payments in default, with a pre-petition arrearage of \$25,459.05.

CHAPTER 7 TRUSTEE'S NON-OPPOSITION

Susan Smith ("the Chapter 7 Trustee") filed a statement of Non-Opposition on March 22, 2018.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on April 5, 2018. Dckt. 80. Debtor asserts that they are under active review for a loan modification with Select Portfolio Servicing, Inc., the servicing agent for Movant. Debtor further asserts that the Homeowners Bill of Rights prohibits a mortgage servicer from conducting a trustee's sale on any real property when a borrower has submitted a complete application for foreclosure prevention until the borrower has been provided with a written determination as to the loan modification application.

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 \$555,801.00 (including \$388,484.15 secured by Movant's first deed of trust), as stated in the Ethan Clark Declaration and Schedule D. The value of the Property is determined to be \$500,000.00, 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).

Here, the court is presented with a Chapter 7 case in which Debtor stated under penalty of perjury (when the case was filed on November 11, 2017, as a Chapter 13 case) that the Property had a total value of \$500,000 but that Debtor's interest in the Property had a value of only \$250,000 (there being another owner of the Property). Schedule A/B, Dckt. 1 at 11. On Schedule D, Debtor lists creditors having liens totaling \$550,000, leaving Debtor with a negative equity in the Property. Dckt. 1 at 23–24.

Debtor's proposed Chapter 13 Plan committed Debtor to making only the current monthly mortgage payment of \$1,856.00 per month to Movant, with \$0.00 to be paid on the \$17,251.00 arrearage.

Plan § 2.08(c). Dckt. 8 at 2. The Additional Provisions of the Plan required Debtor to conduct a short sale (not paying the junior lien creditors in full) to provide for paying Movant's claim in full. *Id.* at 6.

This being Debtor's second bankruptcy case that was pending in the past one year, the automatic stay was subject to being terminated as to Debtor if not extended by the court. 11 U.S.C. § 362(c)(3)(A). As noted by the court at the December 5, 2017 hearing on the motion to extend the stay, if terminated pursuant to § 362(c)(3)(A), the stay terminates only as to Debtor, not as to the bankruptcy estate and property of the bankruptcy estate (such as Debtor's residence for which the above short sale treatment was being proposed). In concluding that the automatic stay should not be extended as to Debtor, the court's ruling as set forth in the Civil Minutes from the December 5, 2017 hearing (Dckt. 31), includes the court questioning Debtor, now in her second case, pursuing a short sale bankruptcy. Also, the court noted that the financial and asset information provided by Debtor was internally inconsistent.

The Chapter 7 Trustee has weighed in, affirmatively stating that she has no opposition to terminating the automatic stay as requested by Movant. March 22, 2018 Trustee's Docket Entry Report. As stated above, by not extending the automatic stay as requested by Debtor, the stay has already terminated as to Debtor. The only remaining stay is as to the estate and property of the estate.

The Chapter 7 Trustee has filed her Report of No Assets, indicating that she has nothing to administer for the bankruptcy estate in this case. March 15, 2018 Trustee's Docket Entry Report; Notice of No Distribution filed on March 16, 2018, Dckt. 70. The deadline for anyone to file an objection to entry of Debtor's discharge is April 30, 2018. Notice of Conversion, Dckt. 51. If nobody files an objection to entry of discharge in the next two weeks, Debtor's discharge will be entered and the case will close quickly, with the Property abandoned back to Debtor and the stay terminated by operation of law. 11 U.S.C. § 349, § 362(C)(1).

Here, the stay has already terminated as to Debtor and the Chapter 7 Trustee does not oppose terminating the remaining stay as it applies to the Property as property of the bankruptcy estate. This Motion for Relief was filed on March 16, 2018. Dckt. 72. Debtor testifies, notwithstanding it being her intention to short sell the Property and not keep it, that on March 26, 2018, a week after the Motion for Relief was filed, Debtor submitted a loan modification application. Declaration ¶ 3, Dckt. 82.

It appears that Debtor argues that the remaining stay should not be terminated so that Debtor can continue to live in the Property that she previously stated (subject to the certifications under Federal Rule of Bankruptcy Procedure 9011) she had no intention to continue to live in. Debtor offers no adequate protection payments, but merely argues that she now desires to pursue a loan modification for a property in which she has no equity and for which there are substantial junior liens that exhaust whatever equity exists for Movant. She and her counsel affirmatively assert that because Debtor submitted a loan modification proposal on March 26, 2018, even if the stay is terminated, Movant could not proceed with a foreclosure until it issues a determination on the request. It appears that Debtor anticipates a rejection of the proposed loan modification.

Cause exists to terminate the automatic stay. In his Declaration, Ethan Clark testifies on behalf of Movant that Debtor is twenty-two months in default in the \$1,339.95 monthly payments. Declaration ¶ 12, Dckt. 74. That is for the months May 2016 through February 2018 (the Declaration being signed on March

14, 2018). *Id.* Cause includes defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432. Though there could be some equity cushion to protect a creditor during a modest delay in obtaining payments (whether in full or the current monthly payment plus a cure amount), here Debtor has been living payment-free (except for \$7,424 in payments made to Movant in the prior Chapter 13 case, 16-27700, Trustee's Final Report, Dckt. 142) in the Property for almost two years. Further, as discussed below, Debtor has no equity in the Property and can gain nothing in good faith by further delay—nothing other than further using the Property for free without any intention or demonstrated willingness to pay Movant.

Additionally, as noted above, the only stay is as to the bankruptcy estate, not as to Debtor, it having been terminated due to Debtor's inability to rebut the presumption of bad faith arising under 11 U.S.C. § 362(c)(2)(A). Cause exists to terminate the remaining stay, which termination the Chapter 7 Trustee does not oppose, solely because Debtor wants to benefit from the stay as it would apply to the bankruptcy estate.

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, 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 Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988).

Based upon the evidence submitted, the court determines there is sufficient equity in the Property. Movant holds a senior lien that totals \$388,484.15 of the total \$500,000.00 value of the home. That leaves a 22.3% equity cushion in the Property, which is sufficient for Movant's senior position. *See In re Mellor*, 734 F.2d 1396, 1401 (9th Cir. 1984) (holding 20% cushion is adequate protection for a secured creditor).

Debtor's Opposition cites to California Code of Civil Procedure § 2924.11 (the section is actually from the Civil Code) for the proposition that Movant has not submitted a determination to Debtor's application for a home loan modification. While that home loan modification was filed on March 26, 2018., a week after Movant filed for removal of the automatic stay, the court will not make any determination on California Civil Code § 2924.11. That is an issue for the state court to determine and make a ruling if Debtor does not believe that Movant is complying with applicable non-bankruptcy law.

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. This order only terminates and vacates the automatic stay under bankruptcy laws.

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, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. Though the court could imagine what grounds a creditor would state under these circumstances for waiver of the stay of enforcement, Movant has chosen not to state such grounds, but only

throw in the request as part of the prayer. 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 Deutsche Bank National Trust Company as trustee for Morgan Stanley ABS Capital I Inc. Trust 2004-HE6, Mortgage Pass-Through Certificates, Series 2004-HE6 in interest ("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 Deutsche Bank National Trust Company as trustee for Morgan Stanley ABS Capital I Inc. Trust 2004-HE6, Mortgage Pass-Through Certificates, Series 2004-HE6 in interest, 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 283 Ursula Drive, Sutter Creek, 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.