

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

June 15, 2017, at 9:30 a.m.

1. [17-22593-E-13](#) **HOWARD THOMAS**
WSS-4 **W. Steven Shumway**

**MOTION TO EMPLOY STANLEY REAL
ESTATE AND INVESTMENT AS
REALTOR(S) , AND/OR MOTION FOR
COMPENSATION FOR STANLEY REAL
ESTATE AND INVESTMENT,
REALTOR(S), MOTION TO SELL ,
MOTION/APPLICATION TO PAY O.S.T.
6-9-17 [36]**

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on, Chapter 13 Trustee, creditors, and Office of the United States Trustee on June 9, 2017. By the court's calculation, six days' notice was provided. The court required six days' notice. Dckt. 33.

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----.

The Motion to Employ and Sell Property is denied without prejudice.

June 15, 2017, at 10:30 a.m.

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Howard Thomas, Debtor, seeks to employ Stanley Real Estate & Investment, Inc., Broker, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Broker to arrange for the sale of real property located at 1913 Ambridge Drive, Roseville, California ("Property").

Debtor also seeks to sell the Property pursuant to 11 U.S.C. §§ 363 and 1303.

Debtor argues that Broker's appointment and retention is necessary to continue to settle and secure funds due to the Debtor's current incarceration. Debtor claims to have given his spouse, Easter Perkins, a power of attorney to sell the Property. The Property has some deferred maintenance and a leak in the roof that has caused damage to the interior of the house. Debtor received an offer from a disinterested third party to purchase the Property in its "as is" condition for \$390,000.00. Escrow closed on the sale of the Property on June 7, 2017, before Debtor's attorney could obtain authorization from the court.

Lori Holloway, an agent of Stanley Real Estate and Investment, testifies that she represented the purchaser of the real property. Lori Holloway testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys. Ryan Watts, a real estate agent of Maloof Properties, testifies that he represented Debtor in the sale of the real property. Further, he agreed to act on Debtor's behalf for a total commission of six percent to be split between the buyer's broker and the seller's broker. Ryan Watts testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The proposed purchaser of the Property is Mark Henderson, and the terms of the sale are:

- A. Purchase price of \$390,000.00, all cash.
- B. Property sold "as is."
- C. Lender of Debtor's mortgage and a judgment lienholder will be paid in full.
- D. Brokers for the sale will receive \$23,400.00.
- E. Debtor will receive proceeds of approximately \$81,517.35.
- F. Buyer shall pay the escrow fee, country transfer tax, city transfer tax, and any private transfer fee.
- G. Seller shall pay for a natural hazard zone disclosure report and for owner's title insurance policy.
- H. Buyer does not intend to occupy the Property as a primary residence.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

OPPOSITION OF CHAPTER 13 TRUSTEE

The court has set this motion for hearing on shortened time due to an unfortunate unfolding of events. Multiple bankruptcy cases have been filed in the name of the Debtor by his current attorney. These were done either by the Putative Debtor or a woman identified as his spouse pursuant to a purported power of attorney.

When the current case was filed, due to the repeated prior bankruptcy cases filed for the Putative Debtor and dismissed, it does not appear that the automatic stay would go into effect in this case. *See* 11 U.S.C. § 362(c)(4). It is unclear why the current bankruptcy case was filed for Putative Debtor.

Facing an imminent foreclosure, a sale of the property was purported consummated without obtaining an order from this bankruptcy court. Though the sale was made and purchase money paid, having been done through a traditional title company escrow, without Putative Debtor having obtained authorization pursuant to 11 U.S.C. § 363(b), the validity of such sale is in doubt.

Putative Debtor filed a motion to dismiss this case, which has been set for hearing by the court. In light of the multiple filings by or for the Putative Debtor, the court did not grant the requested relief *ex parte*.

The Chapter 13 Trustee has filed an Opposition to the Motion, raising legal and jurisdictional issues. The Trustee notes that while the case was filed, the Putative Debtor has not prosecuted the case, failing to appear at the first meeting of creditors and failing to make any plan payments.

In summarizing the current motion, in addition to seeking retroactive authorization to sell the property, it is requested that from the sales proceeds:

- A. \$5,000.00 be paid to Easter Perkins, the women asserted to be the Putative Debtor's spouse and person who asserts the right and powers under a power of attorney.
- B. \$5,500.00 to be paid to Putative Debtor's sons (the Trustee stating that it is not clear whether this is an aggregate amount or \$5,500.00 for each son).

- C. \$10,880.84 in storage fees for Putative Debtor's property (it being reported that Putative Debtor is incarcerated).
- D. \$5,000.00 to Steven Shumway, his attorney in the current bankruptcy case and prior cases, for legal fees relating to the bankruptcy cases, attempted loan modifications, and work in connection with the sale of the property.
- E. \$11,700.00 commission to the listing real estate broker.
- F. \$11,700.00 commission to the buyer's real estate broker.

Sufficiency of Power of Attorney

The Chapter 13 Trustee first questions whether the power of attorney that has been provided (Exhibit A, Dckt. 30 at 15–16) authorizes Easter Perkins to execute the bankruptcy documents and have Mr. Shumway file bankruptcy cases in the name of Debtor. If no valid power of attorney exists, then the bankruptcy filing was not authorized by Putative Debtor, and of no legal force and effect. However, if that were the case, then no bankruptcy case being filed, there was no requirement to obtain authorization from the court to sell property as there was no bankruptcy estate created.

Conflict of Interest

The Chapter 13 Trustee notes that Steven Shumway may have now created a conflict of interest in that the Motion Mr. Shumway filed requests not only disbursements to the purported spouse of Debtor and the two sons, but also to Mr. Shumway himself. That disbursement is for legal services in prior bankruptcy cases, the current bankruptcy case, and for working on the sale.

At the prior hearing where this legal mess was disclosed, no mention was made by Mr. Shumway that he was “profiting” from the sale and getting any of the sales proceeds. The court has ordered Mr. Shumway to hold all of the sales proceeds disbursed from escrow on Putative Debtor's interest to be held in Mr. Shumway's trust account and not to be disbursed except upon further order of the court.

Evidence Presented for Putative Debtor

The Chapter 13 Trustee asserts that the evidence presented for Putative Debtor is insufficient for granting retroactive relief, or any of the relief requested.

Easter Perkins provides her Declaration in support of this motion. Declaration, Dckt. 38. In it she testifies that Putative Debtor is currently incarcerated at the Corcoran, California facility. She asserts that pursuant to the power of attorney she has the right to sell the property of Putative Debtor.

Ms. Perkins testifies that she has sold the Property to Mark Henderson for \$390,000.00. In testifying as to the transaction, a portion of it is based merely on “information and belief.” *Id.*, ¶ 10. For other parts, Ms. Perkins does not provide the court with the actual escrow closing statement, but merely

estimated statement. *Id.*, ¶ 12. However, the escrow was to close on May 31, 2017, and no explanation is offered why there is no actual final closing statement provided.

The second declaration is provided by Lori Holloway. Declaration, Dckt. 40. Ms. Holloway testifies that she is the real estate agent for the purchaser, Mark Henderson. She testifies that she has no connection with Putative Debtor, Ms. Perkins, or other person in this bankruptcy case.

The third declaration is provided by Ryan Watts. Declaration, Dckt. 41. He testifies that he is an agent for Maloof Properties and that he “agreed to act on Debtor’s behalf” for half of the commission. Mr. Watts uses this “act on behalf” language and does not testify that he is Putative Debtor’s agent.

DISCUSSION

This is truly an unfortunate situation. For whatever reason, Easter Perkins and Steven Shumway decided that this fourth bankruptcy case in twenty-four months should be filed for Putative Debtor. Because of their prior multiple failed filings, the filing of this case placed all of the burdens on Putative Debtor but denied him of the main benefit in filing bankruptcy—the automatic stay. Though creating a bankruptcy estate, the pending foreclosure sale was not delayed.

At the June 8, 2017 hearing, the court questioned Mr. Shumway about the “spouse” of Putative Debtor. Using the LEXIS-NEXIS database, the court could not find any record of Easter Perkins being married to Putative Debtor. No copy of a marriage certificate or other marriage record has been filed with the court.

As noted by the Chapter 13 Trustee, the Motion is short on stating grounds why retroactive approval is proper. The power to grant such retroactive relief was discussed by the Ninth Circuit Court of Appeals as follows:

“Applying principles of equity, we have recognized the bankruptcy court's equitable discretion to grant retroactive authorization in other contexts where such relief was necessary or appropriate to carry out the provisions of the Code. See, e.g., *Atkins*, 69 F.3d at 973-74; *Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1070-72 (9th Cir. 2004); see also 11 U.S.C. § 105(a) (granting bankruptcy courts the equitable power to issue any order “that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]”). Under the right circumstances, retroactive validation of a post-petition refinancing transaction will further the provisions of the Code. The bankruptcy court's grant of retroactive approval may provide a significant benefit to the debtor's estate, or otherwise assist the debtor in funding a successful plan for reorganization.”

Sherman v. Harbin (In re Harbin), 486 F.3d 510, 521–22 (9th Cir. 2007).

In discussing the factors considered by the court in granting such retroactive relief, the court in *Sherman* summarized them as follows:

- A. Whether the financing transaction benefits the bankruptcy estate;
- B. Whether the party seeking retroactive relief has adequately explained its failure to seek prior authorization or otherwise established that it acted in good faith when it failed to seek prior authorization;
- C. Whether there is full compliance with the requirements of the applicable Bankruptcy Code Section(s); and
- D. Whether the circumstances of the case present one of those rare situations in which retroactive authorization is appropriate.

Id. at 523.

Here, the Motion merely states as grounds:

- A. Putative Debtor was the owner of the Property.
- B. Putative Debtor is incarcerated.
- C. Putative Debtor has given a power of attorney to sell Property to Easter Perkins.
- D. The Property was encumbered by a first deed of trust securing an obligation of \$271,089.60.
- E. The Property was encumbered by a judgment lien held by American General Financial Services in the amount of \$12,632.37.
- F. An “as-us” offer of \$390,000.00 to purchase the Property was received from Mark Henderson.
- G. Easter Perkins, through the power of attorney, sold the Property, with escrow closing on June 7, 2017.
- H. The Property was sold before Mr. Shumway, as attorney for Putative Debtor, could obtain an order authorizing the sale.
- I. Putative Debtor claims a \$100,000.00 exemption in the proceeds of the sale.
- J. From the proceeds of the sale the obligation secured by the deed of trust and the obligation secured by the abstract of judgment were paid in full. Additionally, commissions of \$11,700.00 each were paid the real estate broker for buyer and the real estate broker for the seller.

- K. Mr. Shumway is holding the net proceeds of the sale, \$81,427.09, in his client trust account.
- L. From these net proceeds, Putative Debtor has authorized the payment of:
 - 1. \$5,000.00 to Easter Perkins to help secured new living accommodations;
 - 2. \$5,500.00 to Putative Debtor's sons to secure new living accommodations;
 - 3. \$10,880.84 (to unidentified person or business) to store Putative Debtor's assets; and
 - 4. \$5,000.00 to Mr. Shumway for legal services in this bankruptcy case, prior bankruptcy cases, and "drafting documents in connection with the sale of the Property."

Motion, Dckt. 36. Based solely on the above grounds Mr. Shumway, Ms. Perkins, and Putative Debtor request that the court ratify the sale, ratify the employment of a real estate broker, ratify the payment of the two real estate commissions, and approve the payments to Ms. Perkins, Putative Debtor's two sons, the storage company/person, and Mr. Shumway.

The above is insufficient for the court to grant such retroactive relief. In substance, it is little more than Mr. Shumway and Ms. Perkins telling the court what they want and for the court to issue an order giving Mr. Shumway and Ms. Perkins what they want—no questions asked.

No attempt is made to state any grounds as to how the \$390,000.00 sale of this property "surprised" Mr. Shumway.

No attempt is made to show that Mr. Shumway had not advised Ms. Perkins that no sale of property could be made once this bankruptcy case was filed without first obtaining a court order.

No attempt is made for Ms. Perkins to testify how she was "confused" and came about to purport to sell the real property without having Mr. Shumway first obtain an order approving the sale.

No attempt is made to show how Ms. Perkins, Putative Debtor, and Mr. Shumway are proceeding in good faith in making this request.

The court notes that May 23, 2017, a Motion to Dismiss was filed for Putative Debtor. Dckt. 19. Because of the repeated non-productive filings for Putative Debtor in the past twenty-four months, the illegible signatures of the holder of the purported power of attorney, and discovering in review of the prior cases that the use of a purported power of attorney had not been disclosed and documents filed incorrectly stating that they had been signed by Debtor, the court did not immediately dismiss the case, but set the Motion to Dismiss filed for Putative Debtor for hearing on June 21, 2017. Order, Dckt. 24, which identifies a number of concerns to the court in the filing and prosecution (or lack of prosecution) of the current and three prior cases.

During the period between May 23, 2017, and the court issuing its order on June 6, 2017, for a hearing on the Motion to Dismiss, Mr. Shumway uploaded two proposed orders dismissing the case, as well as contacting the court to determine the status of his requested orders. This indicates that Mr. Shumway knew something was afoot and needed the case dismissed for some goal achieved.

That “goal” came to light on June 7, 2017, when Mr. Shumway filed a Motion to Shorten Time so he could have heard on June 8, 2017, a motion to approve the sale of the Property. In the Motion to Shorten Time neither Mr. Shumway, Easter Perkins, nor Putative Debtor states that the close of escrow is set for June 9, 2017. Dckt. 29. Rather, there merely is stated that Putative Debtor has a purchaser who is ready and able to “close escrow immediately.”

No declaration is provided in support of the motion to shorten time. No person appears to have been willing to provide any testimony under penalty of perjury about the facts and circumstances by which less than twenty-four hours notice was requested for the court to conduct a hearing to approve the sale of the Property.

The court, rather than issuing an order shortening time to less than twenty-four hours based on a cryptic ex parte motion for which no evidentiary support was provided, conducted a hearing on the motion to shorten time on June 8, 2017. Civil Minutes, Dckt. 31. The court issued an order shortening time to allow the hearing to be conducted on June 15, 2017. Order, Dckt. 33.

That order gets everyone to this June 15, 2017 hearing. Rather than being calmed, the court’s concerns are heightened. The approach of Ms. Perkins and Mr. Shumway to this Motion to Approve Sale/Employment/Commission/Disburse Monies is indicative of persons who never had any intention of complying with the Bankruptcy Code and duties of a debtor and the debtor’s representatives.

If the entire \$81,427.09 was set aside in an account for Putative Debtor, under his control, that would closely approximate his homestead exemption amount. FN.1. But Easter Perkins needs to dip into the monies for \$5,000.00. Then Putative Debtor’s two sons need to dip into the money for another \$5,500.00 (or possibly \$11,000.00).

FN.1. Interestingly, it appears that Easter Perkins, the Putative Debtor, and those assisting them have elected to gift \$12,632.37 to pay a judgment lien rather than Putative Debtor taking advantage of his rights arising under 11 U.S.C. § 522(f) to avoid a judgment lien that impairs an exemption. This does not appear to be consistent with the good faith prosecution of a bankruptcy case, and exercise of a power of attorney, for the benefit of someone who is incarcerated.

After that, some unnamed person is to be paid \$10,880.84 to “store” Putative Debtor’s assets when moved out of the house. No showing is provided as to how such a \$10,880.84 expense is computed and to whom it is paid.

Finally, and pushing this over the top, is that Mr. Shumway appears to dip into the sale proceeds to take \$5,000.00 for the nonproductive bankruptcy cases, the filing of this case for which there was no

automatic stay, work in this case, and also for other work relating to the sale of the Property. No such fees have been approved by this court and no such fees appear to be warranted.

~~_____ Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Stanley Real Estate & Investment, Inc. as Broker for the Chapter 13 Estate on the terms and conditions set forth in the Exhibits in Support of Declaration of Easter Perkins in support of Motion to Sell Real Property Located at 1913 Ambridge Drive, Roseville, California filed as Exhibit B, Dckt. 39. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.~~

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: ~~xxxxxxxxxxxxxxxxxx~~.

~~_____ Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it allows Debtor to fully pay the claims in this case while providing Debtor with proceeds exceeding \$80,000.00.~~

~~_____ Movant has estimated that a six percent broker's commission from the sale of the Property will equal approximately \$23,400.00. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker a six percent commission.~~

~~The court shall issue a minute 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 Employ and Sell Property filed by Debtor 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 Employ is granted, and Debtor is authorized to employ Stanley Real Estate & Investment, Inc. as Broker for Debtor on the terms and conditions as set forth in the Exhibits in Support of Declaration of Easter Perkins in support of Motion to Sell Real Property Located at 1913 Ambridge Drive, Roseville, California, filed as Exhibit B, Dckt. 39.~~

~~_____ **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.~~

~~IT IS FURTHER ORDERED~~ that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

~~IT IS FURTHER ORDERED~~ that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

~~IT IS FURTHER ORDERED~~ that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

~~IT IS FURTHER ORDERED~~ that Howard Thomas, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Mark Henderson or nominee ("Buyer"), the Property commonly known as 1913 Ambridge Drive, Roseville, California ("Property"), on the following terms:

A. ~~The Property shall be sold to Buyer for \$390,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 39, and as further provided in this Order.~~

B. ~~The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.~~

C. ~~Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.~~

D. ~~Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount equal to six percent of the actual purchase price upon consummation of the sale. Three percent commission shall be paid to broker Maloof Properties. Three percent commission shall be paid to broker Stanley Real Estate & Investment.~~

E. ~~No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not~~

~~disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order; shall be disbursed to the Chapter 13 Trustee directly from escrow.~~

~~Pursuant to prior order of the court, Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 which allow for the joining of multiple claims for relief in one complaint has been made applicable to the present motion pursuant to Federal Rule of Bankruptcy Procedure 9014(c) by prior order of the court.~~