UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 25, 2019 at 1:30 p.m.

1.	**15-28908-E-13** **PPR-1**	**WILLIAM/SARAH MCGARVEY** **Matthew DeCaminada**	**MOTION FOR RELIEF FROM AUTOMATIC STAY** **5-24-19 [94]**

CARRINGTON MORTGAGE SERVICES, LLC 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, Chapter 13 Trustee, and Office of the United States Trustee on May 24, 2019. By the court's calculation, 32 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.

Carrington Mortgage Services, LLC ("Movant") seeks relief from the automatic stay with respect to the debtors, William Norbert McGarvey and Sarah Marie McGavery's ("Debtor"), real property commonly known as 10895 Oakton Way, Rancho Cordova, California (the "Property"). Movant has provided the Declaration of Brianna Talley to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Brianna Talley Declaration provides testimony that Debtor has not made 3 post-petition payments, with a total of $3,318.13 in post-petition payments past due. Declaration, Dckt. 96.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on June 11, 2019. Dckt. 101. Trustee notes that Debtor is current under the confirmed plan, and Creditor is provided for as a Class 4.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on June 11, 2019. Dckt. 104. Debtor's counsel states he has met with Creditor and concedes the delinquency in post-petition payments, but that a modified plan will be filed to cure the delinquency.

Despite Debtor's testimony that there have been talks between Debtor and Creditor regarding a modified plan, no withdrawal of motion or stipulation has been filed indicating the Motion is resolved.

DISCUSSION

Two months' default in post-petition payments is not significant in light of Debtor's performance thus far and Debtor's Opposition indicating a modified plan will be filed to cure the delinquency.

However, as Trustee notes, Creditor's claim was provided for as a Class 4 under the confirmed plan. Dckt. 57. As to Class 4 claims, the plan provided:

> Class 4 includes all secured claims paid directly by Debtor or third party. Class 4 claims mature after the completion of this plan, are not in default, and are not modified by this plan. These claims shall be paid by Debtor or a third person whether or not the plan is confirmed. **Upon confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract.**

Id. Thus, this Motion was unnecessary, the stay having already been modified to allow Creditor to exercise its rights.

The court recognizes that creditors may need an order specifying the continuing effect and modification of an automatic say when state recording and filing law come into play, as well as for title insurance purposes.

The Ninth Circuit Court of Appeal has recognized the basic "discretion is the better part of valor" principle when it comes to the automatic stay. Seeking a separate order clearly specifying the scope of the relief granted in the Plan is not inappropriate.

The court grants the Motion, granting relief that under the terms of the confirmed Chapter 13 Plan, Dckt. 57, in this bankruptcy case, "all bankruptcy stays are modified to allow Creditor the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract.

In confirming the absence of stay, Debtor is not left out in the cold. If Debtor is working with Creditor as testified to, then Creditor has every incentive to work things out and get paid through a modified plan.

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 for Relief from the Automatic Stay filed by Carrington Mortgage Services, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the relief is granted pursuant to the Motion, the court confirming that "all bankruptcy stays are modified to allow Carrington Mortgage Services, LLC and its agents and successors, as the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract." Confirmed Chapter 13 Plan, Dckt. 57; Order Confirming, Dckt. 75**.**
>
> No other or additional relief is granted by the court.

2. **17-22333-E-13 JCW-1** **THOMAS WARREN** **Lucas Garcia** **MOTION FOR RELIEF FROM AUTOMATIC STAY** **5-24-19 [71]**

SELECT PORTFOLIO SERVICING, INC. VS.

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, interested parties, and parties requesting special notice on May 24, 2019. By the court's calculation, 32 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 xxxxxxxxxxx.

Select Portfolio Servicing, Inc., servicing agent for U.S. Bank National Association, as trustee, on behalf of the holders of the Home Equity Asset Trust 2005-4 Home Equity Pass Through Certificates, Series 2005-4 ("Movant") seeks relief from the automatic stay with respect to the debtor, Thomas Edward Warren's ("Debtor"), real property commonly known as 11563 Quartz Drive Unit 3, Auburn, California (the "Property"). Movant has provided the Declaration of Kendall Proeun to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Kendall Proeun Declaration provides testimony that Debtor has not made 8 post-petition payments, with a total of $1,715.39 in post-petition payments past due.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $30,735.56, as stated in the Kendall Proeun Declaration, while the value of the Property is determined to be $78,000.00, as stated in Schedules B and D filed by Debtor.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on June 11, 2019. Dckt. 78. Trustee notes Debtor is delinquent $6,521.00 under the confirmed plan, and that there is a pending motion to dismiss the case.

DISCUSSION

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.

INCOMPETENCY OF DEBTOR

This court has been barraged with ineffective attempts by Debtor's sister, Susan Rose, and Debtor's attorney to have a personal representative appointed due to Debtor being mentally incompetent. *See* Civil Minutes, Dckt. 64, for discussion of latest efforts. This has been sought notwithstanding Debtor's sister asserting that the Debtor was legally competent to sign a post-petition power of attorney in favor of the sister on September 27, 2018.

On Schedule A/B Debtor, to the extent he was competent when the case was filed, states that the property securing Movant's claim has a value of $78,000.00. Dckt. 11 at 3. Movant's claim is only $30,000, meaning that this incompetent debtor is looking at losing $50,000 because his sister and counsel cannot prosecute a motion for appointment of a personal representative.

As discussed in the Civil Minutes (Dckt. 64) referenced above, the court was not impressed with the two line expert "to whom it may concern" note (not testimony) from a person identified as an "MD" that the Debtor "is not capable of making complex, legal and financial decisions. . . ." Dckt. 62 at 2. This could be said of many "least sophisticated consumer debtors" who seek relief in the bankruptcy court.

In her latest Declaration (Dckt. 54) Debtor's sister testifies under penalty of perjury that the Debtor was "released to my [Sister's] care" in the summer of 2018. Declaration ¶ 3; Dckt. 54. She continues to testify that while in her "care," Debtor's sister noted a deterioration in the Debtor's mental health. *Id.*, ¶¶ 4, 5.

Because of his deteriorating mental health, Debtor's sister took him to an attorney to obtain a power of attorney in favor of the sister. She testifies that both she and the attorney concluded that Debtor had sufficient competency to give the power of attorney so his sister could act for him in his legal and financial dealings. *Id.*, ¶¶ 6, 7.

With the power of attorney, sister owes fiduciary duties to Debtor. Debtor's counsel owes duties to his client.

Unfortunately, sister and Debtor's counsel, in fulfilling their duties to the Debtor, have only given the court "sister wants to" and "here is a two line note (not expert testimony under penalty of perjury) saying Debtor cannot handle complex legal matters" explanations. While the court has no doubts about Debtor's counsel's ethics, the rules and fulfilling of duties cannot be selectively applied and counsel be given a pass because "he's a good guy."

In reality Debtor's sister and counsel have given the court nothing more than, "sisters says put her in charge, you don't need to see the debtor, you don't need any expert testimony, just give the sister the keys to the Debtor's kingdom."

Now the court sees that Debtor's case is crumbling and those responsible for, and having fiduciary duties to, Debtor are allowing Debtor's rights, interests, and property to be lost.

Though a simple motion, supported by simple expert (independent) doctor testimony, presented by a special counsel (whose credibility on this issue had not been squandered as it has by Debtor's current counsel) to show this is all on the up and up, could have been filed to get a personal representative appointed, none has been done.

Continuance or Denial of Motion

Given Debtor's stated incompetency, the court cannot issue an effective order against him. Movant consented to a continuance of this hearing rather than denial to avoid the cost and expense of having to file a new motion.

In light of the apparent equity cushion, continuing the hearing should not have a negative financial consequence on Movant.

Referral to Adult Protective Services

Debtor's sister, holding the power of attorney she obtained for the stated purpose of caring for Debtor, and his counsel having failed to act, the court now must refer this to Adult Protective Services for the appointment of not only a personal representative in this case but a recommendation for the appointment of a conservator. This has occurred due to the failure of the sister and counsel to act and fulfill their obligations to Debtor. The court shall issue an order to show cause why it should not be ordered that Debtor's sister and counsel pay all of the costs and expenses of a conservator and personal representative, and not have those expenses paid from Debtor's remaining assets.

The court will also refer this to the U.S. Attorney and the Federal Defender for the Eastern District of California for their recommendations of resources for incompetent parties in federal judicial proceedings.

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 for Relief from the Automatic Stay filed by Select Portfolio Servicing, Inc., servicing agent for U.S. Bank National Association, as trustee, on behalf of the holders of the Home Equity Asset Trust 2005-4 Home Equity Pass Through Certificates, Series 2005-4 ("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 hearing on the Motion for Relief From the Automatic Stay is continued to 1:30 p.m. on **xxxxxxxxxx, 2019**.

3. **18-25150-E-13** **RICHARD GREENE** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
APF-3 **Lucas Garcia** **5-20-19 [102]**

ENTERPRISE GROUP VS.

Tentative Ruling: The Motion for Relief From the Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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, interested parties, and parties requesting special notice on May 20, 2019. By the court's calculation, 36 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.

Enterprise Group ("Movant") seeks relief from the automatic stay to allow *Enterprise Group v. Richard S. Greene et al,* Case No. SCV 0041570 ("State Court Litigation") to be concluded. Movant has provided the Declaration of Anthony P. Fritz and Jan Haldeman to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the debtor, Richard Sterling Greene ("Debtor").

The Anthony P. Fritz Declaration provides testimony Movant commenced the State Court Litigation in Placer County Superior Court on August 2, 2018, depositing $36,522.14 with the Clerk of the Placer County Superior Court. Dckt. 106. Fritz further testifies that action is in the nature of an

interpleader, and seeks a determination of Debtor's rights to the interpleaded funds.

Also parties to the State Court Litigation are the IRS and FTB.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on June 11, 2019. Dckt. 115. Debtor argues the State Court Litigation is attempting to take away the Debtor's interest in the partnership based on a disputed notice of cash call by the partnership, and that the attempt should be seen as a repossession of property.

Debtor argues further (1) the state court is not an adequate venue to determine whether the Debtor's partnership interest is property of the Estate; (2) relief should not be granted because Debtor has an offer for the sale of the partnership interest; (3) Debtor has a quasi-trustee right to exercise the ability to unwind the action as the filing of the bankruptcy was within 14 days of the filing of the interpleader that purports to divest him of his 8.94 percent partnership interest.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on June 7, 2019 indicating non-opposition. Dckt. 113.

MOVANT'S REPLY

Movant filed a Reply on June 14, 2019. Dckt. 117. Movant argues the following:

1. The purchase offer has not been demonstrated to be reliable.

2. The case has been pending 10 months, in which time Debtor did not seek a bankruptcy court determination of the partnership interest.

3. Debtor is not entitled to an evidentiary hearing because the value of the partnership interest does not affect the outcome of ownership.

4. Debtor offers no basis for further briefing.

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).

In a hearing on Debtor's first Motion To Sell the partnership interest, the court in denying the motion provided an extensive review of Bankruptcy and California partnership law. Civil Minutes, Dckt. 110.

The facts of this Contested Matter are fairly straight forward. The Debtor, prepetition, violated a default provision of his partnership agreement which triggered a right to buyout. Because the Debtor will receive less for his partnership interest through a buyout than he otherwise would (either by selling his right to profits and losses, which is the only transferable part of the partnership interest (Cal. Corp. Code § 16502), or by retaining the interest and collecting future dividends), he is desperately grasping at whatever other legal options he has.

These options have included attempting to assume the contract pursuant to 11 U.S.C. § 365, attempting to sell the interest to family members, and now attempting to use bankruptcy avoidance powers.

Movant's position has been constant through each motion–Movant seeks only to determine its rights under the partnership agreement in the State Court Litigation already commenced for that purpose.

Debtor has not presented good cause to deny relief here, where there is obviously good cause for granting relief.

Debtor argues state court is not an adequate venue. This argument is not well-taken. The California courts are perfectly apt at interpreting California contracts and partnership agreements pursuant to California law. Moreover, Debtor has not actually proposed resolving the matter in state court, instead proposing several ancillary litigation ideas which might skirt around Debtor's default in the partnership agreement.

Debtor knowing that the dispute exists could have chosen to litigate the issue in this bankruptcy court. However, Debtor has not taken any action to so do. Debtor's response consists of little more than, "no, let's not determine the estate's interest in the partnership, I say it's mine, let's just go with that."

Finally, as the court noted at the hearing on the Motion To Sell, Debtor's partnership interest, whatever that may be, is perfectly saleable. Debtor can sell all his interest in the partnership, which interest would later be subject to a determination in state court.

Granting relief herein will allow the parties to determine their rights in the appropriate forum, eliminating the significant delay Debtor has caused in trying to come up with an "out."

The Motion is granted.

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 Chapter 13 Trustee, David Cusick ("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.

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 Enterprise Group ("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 Richard Sterling Greene ("Debtor") to allow Movant, 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 litigation in *Enterprise Group v. Richard S. Greene et al,* Case No. SCV 0041570 ("State Court Litigation").
>
> **IT IS FURTHER ORDERED** that the automatic stay is not modified with respect to enforcement of any judgment against Debtor, the Chapter 13 Trustee, David Cusick ("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.