

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein
Bankruptcy Judge
Sacramento, California

June 27, 2017 at 1:30 p.m.

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|----|--------------------------------|------------------------|---------------------------------|
| 1. | 14-21304 -C-13 | CHARLIE/LAURA BALANGUE | CONTINUED MOTION FOR RELIEF |
| | EAT-1 | Peter Macaluso | FROM AUTOMATIC STAY |
| | | | 3-31-17 [113] |

WELLS FARGO BANK, N.A. VS.

Tentative Ruling: 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). 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.

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 March 31, 2017. Twenty-eight 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). 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). The defaults of the non-responding parties 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.

Wells Fargo Bank, N.A. seeks relief from the automatic stay with respect to the real property commonly known as 9008 Allbritton Way, Elk Grove, California. The moving party has provided the Declaration of Landis Benjamin Martin to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Martin Declaration states that the Debtor has not made 3 post-petition payments, with a total of \$4,667.74 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 property is determined to be \$279,393.21 (including \$279,393.21

secured by movant's first trust deed), while the value of the property is determined to be \$350,000.00, as stated in Schedules A and D filed by Debtor.

The confirmed plan specifically contemplated that the debtor would file for approval of a loan modification, and, failing to receive court approval, would file an amended plan. No loan modification has been approved and no amended plan has been filed.

Debtors' Opposition

Debtors assert that they are not in default in the amount represented by the creditor, and in any case, equity exists in the property. Debtors do not address the argument that they are in material default under the plan by failing to file an amended plan after not receiving court approval on a loan modification.

Trustee's Response

Chapter 13 Trustee believes that the motion should be granted based on the failure of the debtors to amend the plan after notice of the motion for relief.

Discussion

The existence of missed payments by itself does not guarantee relief from stay. Since the equity cushion provides enough protection to the creditor, moving party's contention that relief from stay be granted simply due to missed payments is not enough to warrant relief from stay. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

However, the court maintains the right to grant relief from stay for cause when the 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. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the confirmed chapter 13 plan specifically contemplated that the debtor would file for approval of a loan modification. No loan modification was filed. As the debtors had knowledge of this, at least from the time that they received notice of the impending motion for relief from stay, by failing to file an amended plan, the debtors are in material default of the terms of the confirmed plan. Therefore, cause exists to vitiate the stay with respect to the above-referenced property.

The court continued this matter to see if the debtors could confirm an amended plan. No amended plan has been filed.

The court shall issue a minute order terminating and vacating the automatic stay to allow Wells Fargo Bank, N.A., 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.

The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 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 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 the creditor 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 Wells Fargo Bank, N.A., 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 which 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 obtain possession of the real property commonly known as 9008 Allbritton Way, Elk Grove, California.

No other or additional relief is granted.
