

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

July 27, 2017, at 10:00 a.m.

1. [16-24717-E-7](#) **GEORGE ALM** **MOTION FOR RELIEF FROM**
AMM-1 **Robert Huckaby** **AUTOMATIC STAY**
 6-22-17 [94]
NATIONSTAR MORTGAGE, 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, and Chapter 7 Trustee on June 22, 2017. By the court's calculation, 35 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.
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George Alm ("Debtor") commenced this bankruptcy case on July 20, 2016. Nationstar Mortgage LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2609 Pinter Avenue, South Lake Tahoe, California ("Property"). Movant has provided the Declaration of Mary Garcia to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

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The Mary Garcia Declaration states that Debtor has defaulted in his loan obligation by failing to make regular monthly mortgage installments for the months of October 2015 through June 2017. The Declaration states that the total arrearage is \$40,115.78, exclusive of attorney's fees and costs.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on July 12, 2017. Dckt. 101. Debtor asserts that:

- A. Movant is not a real party in interest entitled to make this Motion because Movant is only a servicer of the subject mortgage.
- B. The assignment of the Deed of Trust by Mortgage Electronic Registration Systems Inc. ("MERS") is not legally effective because on the Deed of Trust MERS is "solely the nominee for Lender" and not the real party in interest. *See* Dckt. 98, Exhibits 2–3.
- C. The assignment of the Deed of Trust from Bank of America N.A. to Movant does not follow the chain of title to said mortgage.
- D. The Notice of Default and Election to Sell Under Deed of Trust was not executed and filed by a duly appointed trustee under the original Deed of Trust.
- E. The Notice of Trustee's Sale is no longer in effect, which was recorded June 20, 2016, because California Civil Code § 2924 only allows postponement of a sale for less than twelve months.
- F. Debtor has submitted multiple requests for loan modification to Movant, none being completely processed.

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 \$280,604.37, as stated in the Mary Garcia Declaration and Schedule D. The value of the Property is determined to be \$275,000.00, as stated in Schedules A and D.

Notice of a Trustee's Sale and Postponement of the Sale

Debtor asserts that the Notice of Trustee's Sale is no longer in effect because California Civil Code § 2924 only allows a postponement of a sale for "less than twelve months." Dckt. 101. While Debtor failed to identify the specific subsection meant to support this point, the Court can only assume Debtor meant to refer to California Civil Code § 2924g(c)(1), which states in part: "[t]here may be a postponement . . . of the sale proceedings . . . at any time prior to the completion of the sale for any period of time not to exceed a total of 365 days *from the date set forth in the notice of sale.*" CAL. CIV. CODE § 2924g(c)(1) (emphasis added). While the notice of sale was recorded on June 20, 2016, "the date set forth in the notice of sale" is **July 20, 2016**. Dckt. 98, Exhibit 4. The next sale was set for **July 19, 2017**. Dckt. 96. By the

court's calculation, that amounts to 364 days in between, which is within the statutory limitations of § 2924g(c)(1).

However, the court makes no determination of this substantive issue concerning the underlying rights of the parties. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings that address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8–9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

The Chapter 7 Trustee has filed a “No Asset Report” in this case, telling creditors that there is nothing of value for the Trustee to administer in this case. July 14, 2017 Docket Entry Trustee’s Report of No Distribution. Objections to Debtor’s discharge must have been filed by June 28, 2017, as to all parties in interest, except for the Chapter 7 Trustee and the U.S. Trustee, that deadline having been extended by stipulation of Debtor to August 11, 2017. None have been filed as of this court’s July 23, 2017 review of the court’s files.

The Trustee has not filed an opposition to the present Motion, and the Trustee does not contest termination of the stay as it exists for the bankruptcy estate. With the entry of Debtor’s discharge, the automatic stay will terminate as to Debtor and property of Debtor. 11 U.S.C. § 362(c)(2)(C).

Movant is a Sufficient “Real Party in Interest” for the Summary Relief from Stay Contested Matter

The mortgagee of a debtor’s real property can be a real party in interest to seek relief from the automatic stay. When that mortgagee presents documents indicating that a nominee for the original grantee assigned the mortgage to the mortgagee, then the mortgagee has met its burden of demonstrating a colorable claim to the real property. *See, e.g., In re Lopez*, 446 B.R. 12, 18–19 (Bankr. D. Mass. 2011) (citations omitted) (clarifying that MERS acting as “nominee” could transfer a note to the mortgagee). Even just the nominee—in this case, MERS—can qualify as a real party in interest to seek relief. *See, e.g., Mortg. Elec. Registration Sys. v. Freeman (In re Freeman)*, 446 B.R. 625, 632 (Bankr. S.D. Ga. 2011). The assignee of a mortgage must demonstrate standing by showing that the assignment included a transfer of the note to the assignee. *See Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897 (B.A.P. 9th Cir. 2011).

Here, Movant has attached copies of the original note and deed of trust, as well as two assignments. Dckt. 98, Exhibits 1–3. The original deed of trust lists MERS as nominee for Bank of America, N.A., who issued the note. *Id.*, Exhibits 1 & 2. Then, MERS assigned all of its interests “together with the note” to Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP, on August 30, 2011. *Id.*, Exhibit 3. Finally, Bank of America, N.A., assigned all of its interests “together with the note” to Movant on July 12, 2013. *Id.*, Exhibit 3. In the Motion, Movant argues that it is the holder of the note at issue. Dckt. 94 at 2:9–11.

For these summary relief from stay proceedings, Movant has adequate interests and rights to be a real party in interest so that it, and its principal, successors, and assigns can seek to enforce the alleged rights.

Relief Granted Under 11 U.S.C. § 362(d)(1) & (2)

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.

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 that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Property is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

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.

The court does not determine the substantive rights and interests asserted by Debtor or Movant. Those are left for the appropriate action in Superior Court, the District Court, or an adversary proceeding in this court.

Request for Relief from the Fourteen-Day Stay Denied

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. 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.

Request for Prospective Injunctive Relief Denied

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 Nationstar Mortgage LLC and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Nationstar Mortgage LLC 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:

Order Granting Motion for Relief

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 Nationstar Mortgage 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 that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Nationstar Mortgage LLC, 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 2609 Pinter Avenue, South Lake Tahoe, 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.