

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Christopher M. Klein**

Chief Bankruptcy Judge

Sacramento, California

**August 5, 2014 at 1:30 p.m.**

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1.     [14-23313](#)-C-13     PAUL/LYNDA FANFELLE     MOTION FOR RELIEF FROM  
          ANF-2             Peter G. Macaluso     AUTOMATIC STAY  
  7-21-14 [[31](#)]  
  
          PAWNEE LEASING CORPORATION  
          VS.

Local Rule 9014-1(f) (2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 21, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the 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 offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to grant the Motion for Relief from the Automatic Stay.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Pawnee Leasing Corporation seeks relief from the automatic stay with respect to the personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet. The moving party is seeking to exercise its lawful rights and remedies under the written Lease Agreement entered into with Debtors. Movant provides the Declaration of Sandi Carr to introduce evidence (Dkt. 33).

The Carr Declaration states that on September 16, 2013, Innovative

**August 5, 2014 at 1:30 p.m.**

Capital Corp., as Lessor, entered into a Lease Agreement with Crazy for Yogurt Inc. Pursuant to the terms of the Lease Agreement, Innovative Capital Corp. Leased to Crazy for Yogurt a Soft Serve Freezer and 87" Dipping Cabinet. On September 16, 2013, Debtors executed a Guaranty whereby they guaranteed payment by Crazy for Yogurt of all sums to be paid under the terms of the Lease Agreement (Exh. 1), together with costs and attorneys' fees incurred in the collection and enforcement of the Guaranty. (Exh. 2).

Prior to Debtors filing for bankruptcy protection, Innovative Capital Corp. assigned its Lease Agreement to Movant, Pawnee Leasing Corporation. The Assignment is attached as Exh. 3 to Movant's Motion. Movant filed a UCC-1 Filing Statement on the personal property with the California Secretary of State's office (Exh. 4).

The Lease Agreement provides that if the Lessee defaults in the performance of any of its obligations, the Movant may repossess the personal property. Movant alleges that Debtors and Lessee failed to pay the pre-petition March 1, 2014 payment and post-petition April-June 2014 payments. In total, the amount due to cure the default is \$4,535.72. The total balance due under the terms of the Lease Agreement is \$35,968.08.

The declaration offered by Pawnee Leasing Corporation states that it is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and believe [sic]." This could be read two ways. The first is that "whatever I have said is true, to the extent that I have any knowledge about what I am talking about." The second interpretation is that "I am telling you the truth to the best of my ability to testify in this proceeding."

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

§ 1746. Unsworn declarations under penalty of perjury  
Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).  
(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the

foregoing is true and correct. Executed on (date).

(Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief. Trustee is advised to update her declaration forms to be in unqualified compliance with § 1746, as the next time this court, or other judges sitting in this District, may well find the declaration to be insufficient and deny the motion without prejudice and without a hearing.

Movant has provided the court with Exhibits demonstrating the leasing and guaranty relationships. Exhibit 1 to the deficient declaration is the Lease Agreement executed between Innovative Capital Corp. and Crazy For Yogurt, Inc. The Lease Agreement is signed by Lynda Fanfelle as "President" of Lessee and dated September 16, 2013. Exhibit 2 to the declaration is the Guaranty executed by Lynda and Paul Fanfelle. The language of the Guaranty provides that the "Guarantor(s) now hereby individually, jointly and severally, absolutely and unconditionally guaranty to the Lessor (and any person or firm the Lessor may transfer its interest to) all payments and other obligations owed by the Lessee to the Lessor under the Lease . . . ."

The Assignment of Lease is Exhibit 3 and demonstrates a transfer of interest from Innovative Capital Corp. to Pawnee Leasing Corporation concerning the Crazy For Yogurt, Inc. lease.

### **Debtors' Opposition**

Debtors argue that no cause exists for the relief requested. Debtors argue that the reason Movant has not been paid is because Movant has not filed a proof of claim and Trustee cannot disburse payments to Movant without a proof of claim on file.

Further, Debtor argues that the contract relationship between Debtor and Movant is not a "pure" lease and that Debtors have a beneficial interest in paying the claim in Class 2 of their plan. Debtors propose making an adequate protection payment of \$380.00 per month.

### **Discussion**

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 debtor has not made post-petition payments as guarantors of the lease. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

As this is a Lease Agreement and Movant maintains all ownership interest in the personal property, Debtors, as Guarantors under the Lease, have no equity interest in the subject collateral. Debtors, as Guarantors, have not maintained payments under the terms of the Lease Agreement and Guaranty and the court finds sufficient cause to grant the Motion for Relief

from the Automatic Stay.

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 Pawnee Leasing Corporation, 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 personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet.

No other or additional relief is granted.

2. [14-26220](#)-C-13 SHIRLEY SHANNON  
HLC-1 Douglas B. Jacobs

MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION TO  
DISMISS CASE  
7-2-14 [[16](#)]

BUTTE COUNTY TREASURER/TAX  
COLLECTOR VS.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors and Office of the United States Trustee on July 2, 2014. Twenty-eight days' notice is required. That requirement was met.

**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). A creditor having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to continue the Motion for Relief from the Automatic Stay to August 19, 2014 at 2:00 p.m.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Butte County Treasurer/Tax Collector seeks relief from the automatic stay to proceed with pending tax sales, scheduled to occur on August 25, 2014, and to take all action necessary and appropriate to evict Chapter 13 Debtor Shirley Joyce Shannon from the following properties:

1. 0 Takara Ranch, Chico, California
2. 13624 Autumn Lane, Chico, California

Movant further requests that the order be binding and effective in any bankruptcy case subsequently commenced by or against Debtor for a period of at least 180 days, so that no further stay shall arise as to the properties. Movant also seeks a waiver of the fourteen-day stay imposed under FRBP 4001(a)(3). Alternatively, Movant requests that the court dismiss Debtor's case with prejudice against refiling for a period of at least one year.

The moving party has provided the Declaration of Amy Barker to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Barker Declaration states that as of the filing date, the Debtor owes Movant real property taxes totaling \$73,956.84, consisting of \$1,118.21 incurred during the years 2011, 2012, and 2013 as to the Takara Ranch parcel, and \$72,838.63 for the years 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, and 2013 for the Autumn Lane property. In addition, property

taxes are owing on both properties for the 2014 tax year.

#### Bankruptcy History

This is Debtor's third bankruptcy petition filing since March 25, 2012:

Case Number	Filing Date	Disposition
12-25817	March 25, 2012	Dismissed on August 14, 2012 due to unreasonable delay that was prejudicial to creditors.
13-20033	January 2, 2013	Voluntarily dismissed by Debtor on November 7, 2013.
14-46220	June 12, 2014	Pending

Debtor's first two cases contemplated use of loans and sales to pay taxes and other secured debts. Confirmation of the plan in Debtor's first case was denied because the efforts to cure pre-petition arrearage and pay secured claim holders were too contingent as they relied on a refinance and the selling of two real properties. See Dkt. 29, Civil Minutes. After the Trustee's Objection to Confirmation was sustained, Debtor did not amend the plan and the Trustee's Motion to Dismiss was granted (Dkt. 37).

Debtor's second case similarly relied on extensions of debt and sales to effectuate a plan of reorganization. In that case, Debtor received approval from the court to sell real property, with the net proceeds earmarked for the payment to the Internal Revenue Service (Dkt. 66). Debtor filed a Motion to Incur Debt (a reverse mortgage), to pay creditors, including Movant; however, it was withdrawn by Debtor after opposition was filed by the Trustee (Dkts. 58 and 62). The court denied Debtor's Motion to Confirm First Amended Plan on May 14, 2013 (Dkt. 72) based on the contingency of the sale and general lack of clarity regarding payments to taxing agencies.

Three months later, Debtor filed a renewed Motion to Incur Debt in the second case (Dkt. 75), along with a Second Amended Plan and another Motion to Sell real property (Dkt. 90 and 93). Debtor ultimately withdrew the second Motion to Sell, the court denied the Motion to Incur Debt on procedural and evidentiary grounds, and the court denied confirmation of the Second Amended Plan for lack of feasibility.

Debtor moved to voluntarily dismiss the second case on November 5, 2013 and the Motion was granted by order entered November 7, 2013 (Dkt. 124).

Debtor's third case was filed June 12, 2014 and the plan is not materially different from prior plans, other than Movant's claim has been increased three fold. It does not appear that Debtor closed on any sale previously approved by the court and there is no indicated that Debtor has attracted a lender willing to loan money against Debtor's residence.

Movant argues that the first and third bankruptcy filings were motivated in part by pending tax sales, as follows:

<b>Auction Date</b>	<b>Filing Date</b>
June 16, 2012	March 25, 2012 (Case 12-25817)
June 14, 2014	June 12, 2014 (Case 14-46220)

Movant argues that Debtor has filed serial bankruptcy petitions to frustrate and delay it's bi-annual tax sales of the properties, rather than to advance any honest attempt to reorganize debt. Further, Debtor has demonstrated over the course of these cases an inability to reorganize her financial affairs to such an extent that the court has denied confirmation of a Chapter 13 plan four times. Nothing significant has changed in Debtor's circumstances and Debtor is now ten years in arrears to movant.

### **Chapter 13 Trustee Response**

Chapter 13 Trustee responds. At the time of the Trustee's response no payments had come due in Debtor's case. The first plan payment of \$3,089.73 was due on July 25, 2014.

Trustee has filed an Objection to Confirmation (Dkt. 23) that is set for hearing on August 19, 2014.

### **Debtor's Response, filed 7/22/14 (Dkt. 30)**

In response, Debtor asserts that she has tried to sell property to pay her tax obligations and has worked with Tri County Bank to obtain a reverse mortgage. Debtor informs the court that she has two properties in escrow and will be seeking permission from the court to complete those sales. Debtor alleges that the sales will provide for payment of Butte County's claim.

Debtor claims that her situation has significantly changed and she needs a few months to close the escrows, obtain the reverse mortgage, and pay off Butte County.

Debtor requests that the Motion be denied or continued for ninety (90) days to allow time for Debtor to arrange payment of the Butte County debt.

### **Movant's Response, filed 07/29/14 (Dkt. 33)**

Movant responds to Debtor's response and notes that Debtor did not provide any details regarding the properties or sale terms. Debtor's contention that she has "an informal commitment" from Tri Counties Bank is not new and Movant does not find it surprising that Debtor did not provide details of the alleged commitment or that she did not disclose the commitment in her Schedule E. Movant overall takes issue with Debtor's lack of support for statements made in her declaration and points out that Debtor does not explain what her "changed circumstances" are in this case compared to past cases.

### **Discussion and Ruling**

The court's decision is to continue the hearing on the Motion for Relief from Automatic Stay or, in the alternative, Motion to Dismiss, to

August 19, 2014 at 2:00 p.m. On August 19, 2014, the Motion for Relief/Motion to Dismiss will be heard in conjunction with the Trustee's Objection to Confirmation.

The court is aware of the Debtor's filing history and has reviewed the Trustee's Objection to Confirmation, which asserts that no significant changes have occurred since Debtor's last filing (Dkt. 23). However, the Debtor has provided testimony in two forms, at the Meeting of Creditor on July 10, 2014, and through her Declaration (Dkt. 31), on pending sales and potential loan workouts. Specifically, in her Declaration, Debtor states that two pieces of real property are in escrow and that she has an "informal commitment" from Tri Counties Bank for a reverse mortgage. The court questions the veracity of the Debtor's testimony, but is inclined to grant Debtor an opportunity to present undisputable evidence regarding the testimony in her Declaration. If, by the hearing on August 19, 2014, the Debtor has not filed with the court undisputed evidence that she is selling her two properties and engaged in a loan workout with Tri Counties Bank, the court will be inclined to either grant the Motion for Relief from the Automatic with *in rem* relief or the Motion to Dismiss with prejudice.

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/Motion to Dismiss with Prejudice 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 Motion is continued to August 19, 2014 at 2:00 p.m.