

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein
Bankruptcy Judge
Sacramento, California

August 21, 2018 at 1:30 p.m.

1 .	18-22446 -C-13	BRYAN/MARY BROOME	CONTINUED MOTION FOR RELIEF
	DVW -1	Peter Macaluso	FROM AUTOMATIC STAY
			7-3-18 [35]

U.S. BANK, N.A. VS.

Tentative Ruling: The Motion for Relief From 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.

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)(iii).

Local Rule 9014-1(f)(2) Motion -Final Hearing

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on February 14, 2017. By the court's calculation, 14 days notice was provided. 14 days' notice is required.

The Motion for Relief from Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. Opposition was stated at the initial hearing and the Contested Matter set for final hearing.

The Motion for Relief from the Automatic stay is granted.

U.S. Bank, N.A. seeks relief from the automatic stay with respect to the real property commonly known as 7770 Perdez Court, Citrus Heights, California.

The Debtor has not made 2 post-petition payments, with a total of \$3,030.72 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 \$385,520.73, while the value of the property is determined to be \$280,000.00, as stated in Schedules A and D filed by Debtor.

The Trustee filed a response indicating that the debtors are delinquent under the terms of the proposed plan and the Trustee has objected to confirmation.

Debtor's Opposition

The Debtor filed an Opposition (Dckt. 62) requesting a continuance to sell the subject property pursuant to a short sale. U.S. Bank, N.A. filed an opposition to Debtor's request for a continuance.

Movant's Reply

In its Reply (Dckt. 64) Movant asserts that no adequate protection payments have been made by Debtor. Additionally, it is asserted that the pre-petition arrearages are for a ten year period and that there have been two state court actions filed by the Debtor against Movant (or Movant's predecessors in interest), both of which have been dismissed. In the Declaration of James Stefani (Dckt. 64) Movant provides testimony that no proposed short sale had been communicated to Movant as of the August 6, 2018, execution of the Declaration.

DECISION

On August 17, 2018, Debtor filed a pleading titled "Motion to Sell Real Property." Dckt. 71. This was four days before the August 21, 2018 final hearing on the present motion. The Motion to Sell does not seek approval of an actual sale, to an actual buyer, for an actual sales price. Instead, it states that:

1. Debtor has been in bankruptcy for three months. Motion ¶ 2, Dckt. 71.
2. Debtor will do a short sale to some unidentified "bonafide buyer." *Id.*, ¶ 3.
3. The Property has been "listed" at \$280,000. With whom it has been listed is not disclosed. A review of the Docket for this case reflects that the court has not employed any professional to sell the Property. No such authorization having been obtained, such professional is not entitled to payment of fees and costs for any such professional services for the listing, marketing, and sale of the Property. *Id.*, ¶ 4. No such authorization having been obtained, such professional is not entitled to payment of fees and costs for any such professional services for the listing, marketing, and sale of the Property. 11 U.S.C. §§ 327, 330. ^{FN.1.}

FN.1. The court notes that as an Exhibit to a "Motion to Sell" Debtor attached a copy of an Exclusive Listing Agreement, Dated July 26, 2018, by which Josephine Mary Broome and Scott Broome, and Realty One Group Complete have agreed to list and market the Property - without Debtor obtaining authorization to hire them. Exhibit B, Dckt. 73. Knowing that the Debtor is in bankruptcy, Debtor knowing that Debtor is in bankruptcy, and Debtor's counsel knowing that Debtor is in bankruptcy, all chose to having these professional services to be provided without obtaining the required authorization. If retroactive authorization is subsequently sought, satisfying the grounds for retroactive authorization (*Atkins v. Wain*, 69 F.3d 970 (9th Cir. 1995)), such will be approved at that time, but does not alter the

real estate's professional duties to the bankruptcy estate and Debtor as the fiduciary of the bankruptcy estate.

4. Debtor projects that some future sale for \$280,000 to an unidentified "bonafide buyer" will, after costs of sales (apparently including payment to a professional not authorized to be employed) will generate net proceeds of \$262,659.50, which will then be paid to Movant for its secured claim of (\$398,000.00). *Id.*, ¶ 6.

5. Debtor desires to conduct a short sale, at some unstated time, and continue in Chapter 13 for 57 more months in this case. *Id.*, ¶ 7. No terms of any such plan are provided in the Motion.

In the Motion Debtor states that the short sale is "desired" because it will "reduce" Debtor's liability on the Property. *Id.*, ¶ 5. Debtor does not explain how denying the motion to allow Debtor to pursue an unidentified short sale, to which Movant must agree, is warranted. If the relief is granted and Movant allowed to foreclose non-judicially on the Property, Movant will be barred from having a deficiency judgment. Class 3 Plan treatment; Cal. C.C.P. § 580b. (This is the same as when a creditor voluntarily agrees to such a short sale for this type of property and is barred from a deficiency. Cal. C.C.P. § 580e.)

In the Declaration in Support of the Motion to Sell (to some undisclosed buyer, at some non-specified time), Debtor acknowledges that Debtor will not receive any monies from the sale. Declaration ¶ 3, Dckt. 74. The Declaration further states that while Debtor does not now have an offer or buyer, Debtor "anticipate receiving an offer shortly." *Id.*, ¶ 5.

Paragraph 6 of the Declaration includes testimony about a purported trial loan modification, actions taken by Debtor's attorney, and that the terms of the proposed modification were not acceptable. Debtor then states the belief that "due to many violations of the Home Owners Bill of Rights" Debtor believes that the loan should be modified and "look forward to working together [with unstated persons]." *Id.*, ¶ 6.

This testimony is inconsistent with the purported intention to proceed (sometime over the next 57 months) with a short sale of the Property. Rather, it appears that Debtor's actual intention is to pursue/litigate rights to modify the loan, which Movant asserts has ten years of arrearages, not pay Movant through a promptly conducted short sale to which the Movant would agree.

Relief From Stay Granted

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. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Granting this relief is consistent with the position asserted by Debtor in the Reply - conducting a short sale to "reduce" the obligation to Movant. By granting relief to allow Movant to conduct a nonjudicial foreclosure sale Debtor's goal of achieving no deficiency through a voluntary short

sale will be achieved. Even if relief is granted, Debtor may still communicate in good faith with Movant concerning a voluntary shortsale.

The court shall issue a minute order terminating and vacating the automatic stay to allow U.S. 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 U.S. 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 7770
Perdez Court, Citrus Heights, California.

No other or additional relief is granted.
