UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 28, 2018, 1:30 p.m.

1.	**13-23841-E-13** **EAT-1**	**PATRICK PADILLA** **Richard Chan**	**MOTION FOR RELIEF FROM AUTOMATIC STAY** **7-31-18 [77]**

WELLS FARGO BANK, N.A. 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, Creditor, and Office of the United States Trustee on July 31, 2018. By the court's calculation, 28 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 xxxxxxxxxxxxxx.

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to Patrick Michael Padilla's ("Debtor") real property commonly known as 166 Danvers Court, Vacaville, California ("Property"). Movant has provided the Declaration of Rachel Cathcart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Cathcart Love Declaration states that there are 6 post-petition defaults in the payments on the obligation secured by the Property, with a total of $10,598.33 in post-petition payments past due. The Declaration indicates no pre-petition payments missed.

TRUSTEE'S RESPONSE

Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on August 9, 2018. Dckt. 83. Trustee responds to Movant's Motion stating that Debtor's case is complete, a Final Accounting was issued July 17, 2018 (Dckt. 73.), and Debtor has paid $135,516.84 to date. Trustee includes within his Response a detailed history of Debtor's payments.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to Movant's Motion on August 16, 2018. Dckt. 86. Debtor asserts he is not delinquent in post-petition payments, as he has made all payments under the plan. *Id.* Debtor notes further that since the completion of his Plan, Debtor has been making direct mortgage payments. *Id.*

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 $337.190.43 (including $273,469.43 secured by Movant's first deed of trust), as stated in the Love Declaration and Schedule D. The value of the Property is determined to be $196,000.00, as stated in Schedules A and D.

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.

Review of Alleged Default, Confirmed Plan, and Pleadings filed by Movant

The arguments of the Trustee and Debtor are well-taken. Debtor has made all Plan payments, largely in a consistent manner. Dckt. 84. Debtor has also cured all arrearages owed to Movant. *Id.*

The significant discrepancy between Movant's calculations and those of the Trustee and Debtor appear to be a disagreement over payment amounts early on in the Plan. Movant's calculation asserts that monthly payments of $1,357.35 in Principal and Interest, plus an additional $309.27 for monthly escrow costs, totaling $1,666.62. Proof of Claim No 12-3.

Debtor's Plan provided for monthly payments of $1,357.35 for the post-petition current monthly installment, and an additional $291.41 to cure arrears. Dckt. 5. Debtor filed a First Amended Plan in part to increase the amount paid to arrears, but the principal amount for ongoing payments to Movant remained constant. Dckt. 38.

Movant did not object to the confirmation of Debtor's Plan. Movant filed its original Proof of Claim on July 24, 2013 (the month after the original Plan was confirmed in this case). Proof of Claim No. 12. The information provided in Proof of Claim 12 bearing on the Motion now before the court include:

Amount of Secured Claim.....($295,880.47)
Pre-Petition Arrearage.....($ 16,549.82)

Attachment to Proof of Claim No. 12

Pre-Petition Default In Installments.....$1,669.10 each x 8 Payments in Default

Escrow Analysis Statement to Proof of Claim No. 12

Currently Monthly Home Loan Payment.....($1,357.35)
Monthly Escrow Payment.....($ 311.75)

New Monthly Escrow Payment.....($309.27)
Comprised of Monthly
Taxes.....($201.94)
Insurance.....($107.33)

First Amended Proof of Claim 12-1, Filed December 17, 2013

Amount of Secured Claim.....($295,880.47)
Pre-Petition Arrearage.....($ 16,549.82)

Attachment to Proof of Claim 12-1

Pre-Petition Default In Installments.....$1,669.10 each x 8 Payments in Default

Escrow Analysis Statement to Proof of Claim No. 12

Currently Monthly Home Loan Payment.....($1,357.35)

New Monthly Escrow Payment.....($ 309.27)
Comprised of Monthly
Taxes.....($201.94)
Insurance.....($107.33)

On May 11, 2016, Movant filed Second Amended Proof of Claim No. 12-2. The Second Amended Claim slightly reduces the amount of the claim and the pre-petition arrearage. Movant filed Notices of Mortgage Payment Change in 2015, 2017, and 2018.

In response to the Notice of Final Cure Payment, on June 1, 2018, Movant asserts that Debtor is in default for $10,883.93 in payments. The defaults are stated to be:

December 1, 2013	($1,588.42)
November 1, 2013	($1,588.42)
October 1, 2013	($1,588.42)
September 1, 2013	($1,588.42)
Escrow Adjustments	
March 22, 2016	($125.92)
April 12, 2016	($458.81)
February 2017	($2.48)
March 20, 2017	($159.68)
Total	($7,100.57)

This attachment also indicates that there is a positive $12,234.38 being held as the "Debtor Suspense Balance."

At the hearing, Movant's counsel explained that the $12,234.38 reported "Debtor Suspense Balance" consists of **xxxxxxxxxxxxxxxxxxxxxxx**

Actual Default at Issue

From the evidence presented by Movant and the Chapter 13 Trustee, it appears that the real dispute and issue relates to the monthly escrow amount with the plan payments under the original plan that has been confirmed in this case. Movant has confused the issue in not clearly accounting for and identifying the payments not made.

Debtor has not helped clarify the issue, focusing only on the amount provided in the Plan, not what was actually due as set forth in the Proofs of Claim. Debtor has also not provided any information about the property taxes and insurance for the period when no escrow payment was made by Debtor.

At the hearing, the Parties clarified the default, what has been paid, and what is actually outstanding (after taking into account monies held in "suspense" by Movant) is:

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Waiver of Fourteen-Day Stay of Enforcement

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. At the hearing, Movant asserted there was cause to waive the fourteen-day stay because xxxxxxxxxxxxxxxx.

Prospective Injunctive Relief

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 request (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 Wells Fargo, N.A. and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Wells Fargo, N.A. 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:

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 Wells Fargo, N.A. ("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 Motion for Relief from Stay is **xxxxxxxxxxx**

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