

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

September 13, 2016, at 1:30 p.m.

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1. [16-20227](#)-E-13      PAMELA BEARD HUGHES      MOTION FOR RELIEF FROM  
ABG-1      Mikalah Liviakis      AUTOMATIC STAY  
8-5-16 [16]  
  
21ST MORTGAGE CORPORATION  
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.**

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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 August 5, 2016. By the court's calculation, 39 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). 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.

<b>The Motion for Relief From the Automatic Stay is denied without prejudice.</b>
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Pamela Denise Beard Hughes ("Debtor") commenced this bankruptcy case on January 15, 2016. 21st Mortgage Corporation ("Movant") seeks relief from the automatic stay with respect to an asset

September 13, 2016, at 1:30 p.m.

identified as a 2003 HBOS Manufacturing Oakwood (27' x 56') Mobile home; serial number ending in 7587 A/B, decal number ending in 1200, located at 6421 Capital Circle, Sacramento, California (the "Asset"). The moving party has provided the Declaration of Trey Gibson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Trey Gibson Declaration provides testimony that Debtor has not made three (3) post-petition payments, with a total of \$2,117.64 in post-petition payments past due. The Declaration states that as of August 3, 2016, \$70,738.14 is owed as unpaid principal, \$2,117.64 is owed as post-petition arrearages, and \$1,051.00 is owed as attorneys' fees. The Trey Gibson Declaration states that "there is virtually no equity" in the Asset.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$72,855.78, as stated in the Trey Gibson Declaration, while the value of the Asset is determined to be \$75,000.00, as stated in Schedules B and D filed by Debtor.

### **Review of Motion**

The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which relief is based:

- A. Documentation of the Movant's interests in the collateral is set forth in the exhibits.
- B. The obligation secured by collateral is \$73,133.22.
- C. The value of the collateral is \$75,000.00 (which, as identified in the Declaration, is based on Debtor's Schedules).
- D. Debtor is in default in three post-petition payments.
- E. Declarations are included that provide evidence in support of the Motion.

Dckt. 16. The Motion does not state whether relief is sought for cause (11 U.S.C. § 362(b)(1)) or because of a lack of equity and that the property is not necessary for an effective reorganization (11 U.S.C. § 362(b)(2)). The Motion does not allege that the property is not necessary for an effective reorganization.

### **TRUSTEE'S STATEMENT OF NON-OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on August 30, 2016.

### **DEBTOR'S OPPOSITION**

Debtor filed an opposition on August 31, 2016. Dckt. 29. By the court's calculation, 13 days' notice was provided. 14 days' notice is required. Being one day late is not significant to Movant, the court, or other parties in interest in addressing this Motion.

In her opposition, Debtor confirms her delinquency and asserts that she has filed a modified plan (Dckt. 24) that cures the mortgage arrears and maintains the monthly payments to Movant. Debtor's Motion to Confirm Modified Chapter 13 Plan has been set for hearing on October 4, 2016, at 3:00 p.m. Dckt. 22.

Debtor's opposition states a number of grounds that are pulled from her Declaration in support of the Motion to Confirm Modified Chapter 13 Plan. While those statements do not correlate perfectly to Debtor's instant Opposition, the court notes that Debtor states the following grounds for confirming her modified plan:

- "1) I am the debtor in the above-captioned case and I make this declaration in that capacity. If called upon to do so, I am prepared to testify to the below stated facts.
- 2) My currently proposed chapter 13 plan provides for monthly payments of \$489.00 for 6 months and \$1,299 for the remaining 54 months. This provides unsecured creditors an approximately zero percent payment on their claims. The reason that I need to modify any plan is because I was not able to cancel several auto-draft payments that I had set up prior to the bankruptcy from my account until after I filed bankruptcy. As a result of these creditor payments I fell behind on my mortgage payment. I now wish to catch up the missed payments on my mortgage payment by including it in the plan.

***Compliance with 11 U.S.C. §1325(a)(1):***

- 3) I submit this chapter 13 Plan with the good faith belief that it is in compliance with all of the provisions of the Bankruptcy Code. The Plan proposes to pay my unsecured creditors as much as I can afford to pay. All secured creditors shall consent to the Plan, be paid the full amount of their claims or their collateral shall be surrendered. I shall pay all administrative expenses and priority unsecured claims in full. The remaining portion of the plan payments shall be disbursed to unsecured claimants.

***Compliance with 11 U.S.C. §1325(a)(2):***

- 4) I paid the required filing fee upon filing this case. I am unaware of any other Court fees, administrative fees or other expenses that are due prior to Plan confirmation, but if additional Court fees arise, I plan to pay these amounts in full prior to confirmation.

***Compliance with 11 U.S.C. §1325(a)(3):***

- 5) I estimate approximately \$26,974.99 in general unsecured claims and estimate that I will satisfy approximately 0% of these claims through monthly payments of disposable income for the plan period. My current Plan is a good faith proposal to pay my creditors as much as possible. I do not suggest any illegal methods for executing the Plan.

***Compliance with 11 U.S.C. §1325(a)(4):***

- 6) I do not own any piece of real property.
- 7) I have approximately \$107,913 worth of personal property. After exemptions there is \$1133 in non-exempt assets. However, after factoring in costs of sale (8% for the

mobile home and 5% for personal property), the sale of these assets would not likely yield any return.

- 8) Therefore, in a chapter 7 case unsecured creditors would likely receive \$0.
- 9) Through monthly payments for the Plan duration, I anticipate paying general unsecured creditors approximately 0% of their respective claims. This is at least as much as the general unsecured creditors would receive in a chapter 7.

***Compliance with 11 U.S.C. §1325(a)(5):***

- 10) Under the Plan, I will continue to pay 21<sup>st</sup> Mortgage Corp according to my pre-petition agreement with it. I will cure the arrears via monthly payments of \$110 for months 28-57 of the Plan.

***Compliance with 11 U.S.C. §1325(a)(6):***

- 11) I have a steady income that I can use to fund the plan.
- 12) I receive approximately \$4,354 per month from my job as a supervisor with The State of California.

***Compliance with 11 U.S.C. §1325(a)(7):***

- 13) With my current monthly income and expenses I cannot pay current creditors without modification. I did not file my case to gain an unfair advantage. My willingness to dedicate my disposable income to plan payments is further evidence that I filed in good faith.

***Compliance with 11 U.S.C. §1325(a)(8):***

- 14) I do not have any domestic support obligations.

***Compliance with 11 U.S.C. §1325(a)(9):***

- 15) I am current with all federal and state and local tax returns.

***Compliance with 11 U.S.C. §1325(b):***

- 16) I have not received any objections by unsecured claimants or the trustee to the current plan at this time.”

However, Debtor does not provide any evidence (either testimony or exhibits) in opposition. Rather, her attorney merely argues “facts.”

## **DISCUSSION**

Here, the motion alleges a marginal equity cushion, does not allege a risk to the collateral, and does not assert that this Property is not necessary for an effective reorganization. Debtor has filed and is pursuing confirmation of a Chapter 13 Plan. The court has reviewed the Motion to Confirm the Modified Plan and the Declaration in support filed by the Debtor. Dckt. 21, 23. The Motion appears to comply with

Federal Rule of Bankruptcy Procedure 9013 (stating grounds with particularity), and the Declaration appears to provide testimony as to facts to support confirmation based upon her personal knowledge (Fed. R. Evid. 601, 602).

Here, Debtor is actively prosecuting her case. The merits of her plan can be addressed in connection with the motion to confirm the Chapter 13 Plan. Movant has not provided the court with grounds, or evidence for relief under 11 U.S.C. § 362(d)(1) or (2). The court does not assume what grounds might be stated, as the court does not know if Movant would actually make such allegations (subject to the certifications of Fed. R. Bankr. P. 9011) in a motion.

The Motion is denied without 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 filed by 21st Mortgage Corporation (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the Motion is denied without prejudice.

2. [11-45395](#)-E-13      **NADER SHAHCHERAGHI**  
APN-1                      **Peter Macaluso**

**LAKESIDE GREENS HOMEOWNERS  
ASSOC., VS.**

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
AND/OR MOTION FOR RELIEF FROM  
CO-DEBTOR STAY  
4-21-16 [\[84\]](#)**

**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.**

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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, parties requesting special notice, and Office of the United States Trustee on April 21, 2016. By the court's calculation, 33 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). 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.

<b>The Motion for Relief From the Automatic Stay is denied without prejudice.</b>
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Lakeside Greens Homeowners Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3401 Bermuda Ave, Apt. 26, Davis, California (the "Property"). Movant has provided the Declaration of Peg Hart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Hart Declaration states that there are 54 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$23,649.08 in post-petition payments past due.

According to the Declaration of Peg Heart, the manager of Lakeside Green Homeowners Association, the defaults date back to November 1, 2011. Declaration, Dckt. 86. She testifies that the Homeowners' Association suffered,

- A. The first post-petition default in November 2011, and Movant did nothing;
- B. Then the second post-petition default in December 2011, and Movant did nothing;
- C. Then the third post-petition default in January 2012, and Movant did nothing;
- D. Then the fourth post-petition default in February 2012, and Movant did nothing;
- E. Then the fifth post-petition default in March 2012, and Movant did nothing;

these monthly now, in April 2016, defaults continued, with;

- F. The twelfth post-petition default in October 2012, and Movant did nothing;
- G. Then the thirteenth post-petition default in November 2012, and Movant did nothing;

these monthly now, in December 2012, continued, with;

- H. The twenty-fourth post-petition default occurring in October 2013, and Movant did nothing;
- I. Then continuing monthly, with the thirty-sixth post-petition default occurring in October 2014, and Movant did nothing;
- J. Then continuing monthly, with the forty-eight post-petition default occurring in October 2015, and Movant did nothing; until
- K. The fifty-fourth continuing monthly default which occurred in April 2016, when Movant "sprung" to action.

The Hart Declaration fails, or is careful to not provide, any explanation as to why and how, if there is a bona fide obligation owing, the Homeowner's Association failed to act.

The court notes that after slumbering for fifty-four months, for which there are alleged to be association dues owing, Movant demands that the court waive the normal fourteen-day stay of enforcement, because now, years later, Movant claims that it is not adequately protected.

The Movant is seeking relief from the automatic stay as well as relief from the co-debtor stay pursuant to 11 U.S.C. § 1301.

### **TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 10, 2016. Dckt. 90. The Trustee states that the Debtor is \$1,700.00 delinquent under the plan. The Creditor is included in Class 2A to be paid a monthly dividend of \$264.47 with an interest rate of 4.75%. The Creditor has filed Proof of Claim No. 7 in the amount of \$14,135.31 for pre-petition HOA Assessments. The Trustee has disbursed \$12,784.46 principal and \$1,775.66 interest on the claim. The Debtor's confirmed plan does not contain any provisions regarding post-petition HOA assessments.

### **DEBTOR'S OPPOSITION**

The Debtor filed an opposition to the Motion on May 17, 2016. Dckt. 93. The Debtor states that the plan provides for the pre-petition arrears. The Debtor incorrectly made the assumption that the ongoing, post-petition payments to Creditor were covered in the plan.

While Debtor is delinquent in payments to Creditor, Debtor argues that he should not be penalized with the loss of his property for the way the Plan was proposed and confirmed. The Debtor seeks a provision that will allow him to cure the post-petition delinquency.

The Debtor asserts that he will be current on or before the hearing.

### **MAY 24, 2016 HEARING**

At the hearing, both Parties requested that the court continue the hearing so that they and their clients could further pursue a settlement to address the underlying issues. The court continued the hearing to 1:30 p.m. on June 14, 2016.

### **JUNE 14, 2016 HEARING**

At the hearing, the parties agreed to continue the matter to 1:30 July 19, 2016, to allow them to document a settlement.



## **JULY 19, 2016 HEARING**

The parties appeared and requested a continuance, stating that they are in the process of documenting a settlement. The hearing was continued.

## **AUGUST 2, 2016 HEARING**

At the hearing, the parties stated that a settlement has been worked out, and a stipulation is being prepared, but they have been delayed due to an illness of Debtor's counsel. The parties agreed to continue the hearing to September 13, 2016, at 1:30 p.m.

## **DISCUSSION**

To date, no supplemental papers have been filed in connection with the instant Motion.

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 \$241,984.08 (including \$23,649.08 secured by Movant's assessment lien), as stated in the Hart Declaration and Schedule D filed by Nader Shahcheraghi ("Debtor"). The value of the Property is determined to be \$385,295.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Property for Movant's claim provides adequate protection such claim at this time. In re Avila, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

With respect to the present Motion, Movant has shown that it is adequately protected. First, it has a lien in property with more than enough value to pay any debt – so long as such debt is actually owing and enforceable. Second, Movant has shown that it is adequately protected by choosing not to act for almost five years.

Movant's conduct is inconsistent with that of a homeowner's association which is actually providing services for which dues are owing. It is inconsistent with a creditor who is actually owed a debt. Movant, while having the opportunity to explain to the court some reasonable basis for the financial somnolence, if there is actually a debt owing, has chosen not to do so.

## **Debtor's Opposition**

Debtor's opposition is equally lacking. First, Debtor fails (or refuses) to provide any evidence to support the arguments advanced by his current attorney in opposing the Motion. All that is argued is that

Debtor “assumed” that the future, post-petition dues would (somehow) be paid as part of a pre-petition claim. Debtor does not (or will not) so testify, but merely this is argued by his counsel.

Next, Debtor’s counsel assures the court that Debtor will find almost \$24,000.00 between the May 17, 2016 filing of the Opposition and the May 24, 2016 hearing. Opposition, p. 2:7-8; Dckt. 93. If the Debtor has access to such a large sum of money, then the financial information provided to the court under penalty of perjury to support a less than 100% plan appears suspect.

As between Debtor and Movant, Debtor’s argument is less non-credible then Movant’s arguments and evidence.

The court denies the Motion without prejudice. With just months left in the current Chapter 13 Plan, it appears doubtful that Debtor can cure the arrearage, if one actually exists. If Debtor can produce the money to cure the almost \$24,000.00 arrearage in one fell swoop, then the Chapter 13 Trustee and creditors have some time to investigate further and determine whether the current plan is in good faith and consistent with the Bankruptcy Code.

Therefore, the Motion is denied without prejudice.

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 Lakeside Greens Homeowners Association (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, the Parties jointly requesting that the hearing be continued, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion for Relief From the Automatic Stay is denied without prejudice.