

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 21, 2016, at 9:30 a.m.

1. [15-23328-E-7](#) **KAREN LUXTON-LOSER** **MOTION FOR RELIEF FROM**
EMM-1 **Chinonye Ugorji** **AUTOMATIC STAY**
 8-18-16 [51]
THE BANK OF NEW YORK MELLON
VS.

Final Ruling: No appearance at the September 21, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on August 18, 2016. By the court's calculation, 34 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, 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.

<p>The Motion for Relief From the Automatic Stay is granted.</p>

Wilmington The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006-OA14 ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3531 Greenview Lane, Sacramento, California ("Property"). Movant has provided the Declaration of Brittney Forrest to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Forrest Declaration states that there are sixteen (16) post-petition defaults in the payments on the obligation secured by the Property, with a total of \$15,951.69 in post-petition payments past due. The

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Declaration also provides evidence that there are eight (8) pre-petition payments in default, with a pre-petition arrearage of \$8,967.12.

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 \$175,688.00, secured by Movant's first deed of trust, as stated in the Schedule D filed by Karen Luxton-Loser ("Debtor"). The value of the Property is determined to be \$156,000.00 as stated in Schedules A and D filed by Debtor.

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. *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, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). 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 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.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

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 Wilmington The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006-OA14 ("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 immediately vacated to allow Wilmington The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWALT. Inc., Alternative Loan Trust 2006-OA14 , 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 3531 Greenview Lane, Sacramento, California, California.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

BANK OF THE WEST VS.

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.

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on September 6, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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). 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. At the hearing -----.

The Motion for Relief From the Automatic Stay is denied without prejudice.

Bank of the West ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 763 Main Street, Chester, California ("Property"). Movant has provided the Declaration of Gail Wilson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

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 \$385,453.28 secured by Movant's first deed of trust, as stated in the Wilson Declaration and Schedule D filed by ("Debtor"). While the Property was valued by the Debtor at \$800,000.00, the Declarations of Gail Wilson filed in support of the motion and Kimberly Husted

(“Trustee”), which was filed in support of the Trustee’s Motion to Abandon, testifies that the value of the Property is significantly lower. Gail Wilson’s Declaration states that “Bank of the West had an appraisal conducted of the Real Property in October 2015. At that time the ‘as is’ valuation was \$363,000.”

The Trustee’s Declaration states that the Subject Property:

“is subject to a Covenant to Restrict Use of Property Environmental Restriction which was entered into as a result of the Department of Toxic Substances Control determining that there was a need to protect present or future human health or safety of environment as a result of the presence on the land of hazardous materials. The Covenant reflects that the Shop cannot be used as a residence, hospital, school for persons under the age of 21 or day care center as it would entail an unacceptable cancer risk hazard. However, the Covenant acknowledges that the current usage does not present an unacceptable threat. The Covenant also provides that there shall be no activities that disturb the soil without prior approval and prohibits the property from being used to raise food, drilling for water, oil, or gas (without prior approval), or excavation (without prior approval).”

Husted Declaration. Dckt. 333.

REVIEW OF THE MOTION

Unfortunately for Movant, the Motion does not state whether relief is sought for cause (11 U.S.C. § 362(d)(1)) or because of a lack of equity and that the property is not necessary for an effective reorganization (11 U.S.C. § 362(d)(2)). The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which relief is based:

- A. “At the time of the filing of this Bankruptcy, the debtor was obligated to Bank of the West the principal sum of \$360,730.68 based upon a promissory note executed by the debtor on October 17, 1997. This sum did not include expenses incurred by the Bank of the West, nor attorney’s fees, foreclosure expenses, or accrued interest.
- B. Pursuant to an order of this Court dated December 11, 2015, Bank of the West has received payment of \$100,000 representing proceeds from the sale of certain equipment of the debtor that was also pledged as security to bank of the West.
- C. The Bank of the West holds a properly perfected senior security interest in the Real Property pursuant to a deed of trust duly recorded with the Plumas County Recorder’s Office on October 27, 1997, at Book 721, Page 262.
- D. As of September 6, 2016, the amount due Bank of the West, (after the pay down from the Equipment) amounts to \$385,453.28, of which \$260,730.68 is for principal, \$31,846.61 is for interest (\$28.75280 per diem), \$22,087.19 is for late fees, and \$70,788.80 is for expenses.

- E. The Chapter 7 Trustee, Kimberly J. Husted, had made a ongoing effort to sell the Real Property. In May 2015, the trustee obtained an order to retain Colliers International CA, Inc. and Lake Almanor Brokers to market and sell the Real Property.
- F. In October 2015, the trustee obtained a second order to retain the same brokers when the listing expired.
- G. In January 2016, the trustee obtained another order to re-employ the brokers. As set for in the trustee's declaration filed on July 20, 2016, she received no acceptable offers. (Docket No. 333.)
- H. In August 2016, this Court approved the trustee's motion to abandon the Real Property based upon the trustee's conclusion that there was no equity in the property for the benefit of the estate."

Motion, Dckt 354.

DISCUSSION

The Motion correctly states that the Trustee has abandoned the Property pursuant to an order of the court. Order, Dckt. 348. The Property was abandoned back to the Debtor, Walter Helge Schaefer by the order itself, with no further act of the Trustee required. By the abandonment, the Property is no longer property of the bankruptcy estate 11 U.S.C. § 554; *Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.)*, 371 B.R. 412, 418 (B.A.P. 9th Cir. 2007) (providing that if no previous order of abandonment is entered for disclosed property, upon the closing of the case the property is abandoned from, and not part of, property of the estate; 11 U.S.C. § 554(d)).

Once no longer property of the estate, the automatic stay terminates by operation of law pursuant to 11 U.S.C. § 362(c)(1) as it applies to property of the estate.

The remaining scope of the automatic stay as may apply to property abandoned is pursuant to 11 U.S.C. § 362(a) as to acts taken against the Debtor or property of the Debtor. However, on May 19, 2016, the Debtor was granted his Chapter 7 discharge in this case. Dckt. 133. The automatic stay, as to the Debtor, terminated by operation of law as to the Debtor and property of the Debtor upon entry of the discharge. 11 U.S.C. § 362(c)(2)(C).

In the Motion, Bank of the West requests an order for the Bank to be "relieved of all stays of the Bankruptcy court to take any and all steps necessary or permitted in accordance with applicable state law to recover possession of the Real Property." Motion, p. 3:7–9. The Motion does not state what, if any such stays, exist and for which relief should properly be granted.

The court cannot identify any "stays of the bankruptcy court" for which relief is being requested. The automatic stay, the obvious one for which a creditor seeks relief to foreclose on collateral, has been terminated as to the Property.

The Motion is denied without prejudice as moot, the automatic stay having been terminated as to the Property.

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 Bank of the West (“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 the Automatic Stay is denied without prejudice as moot, the automatic stay having terminated as to the real property commonly know as 763 Main Street, Chester, California, by operation of law pursuant to 11 U.S.C. § 362(c)(1) (the property having been ordered abandoned by the Trustee) and § 362(c)(2)(C) (the discharge of Debtor having been entered).