

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

October 22, 2013 at 1:30 p.m.

1. [12-33383](#)-E-13 JOHN HOLLIS
Michael DeDecker

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
8-26-13 [[156](#)]

ANNIE M. HOLLIS VS.

CONT. FROM 9-17-13

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, all creditors, and Office of the United States Trustee on August 26, 2013. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Final 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. The court continued the hearing to allow Movant to address the substantive and procedural defects. No supplemental pleadings were filed by Movant. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to deny the Motion for Relief from the Automatic Stay without prejudice. No appearance at the October 22, 2013 hearing is required.

Annie M. Hollis seeks relief from the automatic stay with respect to the real property commonly known as 7624 Tierra Arbor Way, Sacramento, California.

However, the Local Rules require that movant's notice of the hearing disclose whether or not the motion is filed under Bankruptcy Rule 9014-1(f)(1) or Bankruptcy Rule 9014-1(f)(2), and whether or not written opposition to the motion is required. See Local Bankr. R. 9014-1(d)(3). The notice provided here

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did not so specify. This is improper. Failure to comply with the local rules is grounds to deny the motion. See Local Bankr. R. 9014-1(1).

As evidence in support of the motion the Movant has provided the Declaration of Steven H. Berniker, Counsel for Debtor, to introduce evidence and authenticate the documents upon which Movant bases the claim and the obligation owed by the Debtor. Counsel's witness testimony, in addition to possibly waiving the attorney-client privilege with respect to these matters, is subject to the same rules as a non-attorney witness. See Fed. R. Evid. 602, 701, 801, 802.

Personal Knowledge Testimony of Counsel

Mr. Berniker provides his personal knowledge testimony relevant to the present Motion as to the following facts:

1. John W. Hollis (the Debtor) and Annie M. Hollis were married on March 25, 1979. The parties separated on March 1, 2011. [Mr. Berniker provides no basis for having any personal knowledge of the marriage 34 years ago.]
2. John W. Hollis and Annie M. Hollis separated on March 1, 2011. [Mr. Berniker provides no basis for having any personal knowledge of the separation.]
3. John W. Hollis filed for dissolution of marriage on September 27, 2012. [Mr. Berniker provides no basis for having any personal knowledge of the Debtor filing for dissolution of marriage.]
4. The Chapter 13 Plan filed on February 13, 2013 states that Husband is not paying the mortgage on the community residence located at 7624 Tierra Arbor Way and that Debtor is enjoying a reverse mortgage income at an amount unknown. [Other than possibly reading a document which is not now before the court, Mr. Berniker does not show a basis for having personal knowledge of the Debtor's plan in this case.]
5. Schedule A characterizes the real property as community property. The income is community. Creditor/Wife has not benefitted from the reverse mortgage. Debtor uses all income for his own use and benefit.
6. On February 13, 2013, Creditor filed a Motion to Compel Discovery and Debtor claimed that he was unable to comply with discovery because of this bankruptcy. The Superior Court ordered Debtor to produce documents and pay sanctions in the amount of \$680.00 but Debtor has failed to comply.
7. Schedule I shows Debtor is enjoying \$1,047.00 per month of pension income and Creditor asserts that the entire pension is community property. Creditor has not benefitted from the Debtor's pension.

8. Schedule I does not disclose the reverse mortgage or the income from it.
9. Schedule I shows that Debtor/Wife income at \$781.00 per month.
10. Wife is requesting relief from the stay so the state court can characterize the property and divide it under California law.

A witness is one who has personal knowledge (other than an expert witness) of the facts which are to be presented to the court. The court cannot determine what, if any, of what Mr. Berniker is testifying to is of his personal knowledge and what is made up or hearsay testimony. When Movant files a new motion, she may need to find a witness who can competently testify in this court.

The Movant has provided the court with a state court minute order and the Debtor's Chapter 13 Plan. The Declaration fails to authenticate the state court minute order, having it just appear in this court's file.

DISCUSSION

The Debtor commenced this bankruptcy case on July 20, 2012. On April 15, 2013, the court filed the order confirming the Chapter 13 Plan in this case. Order, Dckt. 155. The Original and Amended Master Mailing Lists filed by the Debtor do not include Movant. Dckts. 8, 37. A Spousal Waiver of Right to Claim Exemptions was filed on September 11, 2012. It is signed by Annie M. Hollis. Dckt. 36. Movant is not listed on the certificates of service for the motion to confirm the plan. Dckts. 138, 139.

First, the court has not been presented with credible evidence in support of the Motion. Merely because counsel was hired by Movant, that does not make counsel a competent, credible witness for hire.

Second, the Motion is not clear in the basis for and the relief to be granted by the court. The grounds which have been stated with particularity in the Motion (FRBP 9013) are:

- A. Movant was the spouse of the Debtor.
- B. Movant is the owner of community property identified as the 7624 Tierra Arbor Property with the Debtor.
- C. The Debtor has been receiving a reverse mortgage [though not stated it appears to be a reference to receiving monthly payments on a reverse mortgage which is secured by the Tierra Arbor Property]. Movant is not receiving any portion of the reverse mortgage payments.
- D. The Debtor also receives a \$1,047 pension payment a month, of which Movant receives no portion. Movant asserts that the monthly pension payment is community property.
- E. Debtor has "been in the reverse mortgage since 2009," and Movant asserts that "there is no monthly contract installment to be paid." Therefore, the property is not necessary for an

effective reorganization. [On this contention, the court cannot determine if Movant asserts that there are no mortgage payments or no reverse mortgage payments. If the latter, it appears to contradict the allegations that the Debtor has been receiving reverse mortgage payments. Further, the court cannot divine how the existence or non-existence of the payments, in and of themselves, make the property not necessary for an effective reorganization.]

Thereon, Movant requests relief from the stay so that she may,

- A. "Take measures necessary to protect her community interest in the 7624 Tierra Arbor Property, reverse mortgage, and Debtor's pension." These non-specific acts are stated to income the state court dividing the community property [indicating that she want's the state court to exercise control over property of the bankruptcy estate] between the Debtor and Movant.
- B. The Movant brings the motion pursuant to Bankruptcy Rule 112(2)(D) of the United States Bankruptcy Court for the Central District of California. It then states that a formal response must be filed with the court not less than five days before the hearing.

As is obvious, this is not the Bankruptcy Court for the Central District of California and the local rules of that court are not the local rules in this court. The statement in the motion is incorrect as to how opposition may be presented to this motion filed pursuant to Local Bankruptcy Rule 9014-1(f)(2).

The Motion fails to state grounds upon which the court can grant relief. At best, it says that the Debtor's estate includes community property and Movant wants to take the community property out of the bankruptcy estate. Merely wanting to do so is not grounds for relief.

The Debtor provided his declaration in support of the motion to confirm the Chapter 13 Plan. Declaration, Dckt. 137. In it he testifies that he does not have a mortgage payment, with the "mortgage" on his property securing a Reverse Mortgage in the amount of \$144,991.00 to MetLife Home Loans. The Debtor uses the same curious language as counsel, stating that he has "been in the Reverse Mortgage contract since June 2009."

Under the confirmed plan the Debtor is paying \$150.00 a month to the Trustee. That money is used to pay the Class 2 Claim of Golden 1 Credit Union for its claim secured by a vehicle (\$57.90 a month). The Debtor has surrendered the 10124 Shuler Ranch Property as a Class 3 Claim. No other claims, other than a Class 7 unsecured dividend, are to be paid.

Under the Plan the Debtor seeks to "lien strip" a second deed of trust held by OneWest Bank. Though not stated in the Plan, the OneWest Proof of Claim identifies its collateral as the 7624 Tierra Arbor Way Property. Proof of Claim No. 2. The Note attached to the Proof of Claim lists only the Debtor as the borrower. The Deed of Trust attached to the Proof of Claim identifies the Debtor as a married man who is granting the deed of trust on his separate property.

If as contended by Plaintiff the 7624 Tierra Arbor Property is community property, it is property of the bankruptcy estate. 11 U.S.C. § 541(a)(2). This is all of the community property, not only a debtor's partial interest in the property. The federal court has exclusive jurisdiction over property of the bankruptcy estate. 28 U.S.C. § 1334(e)(1). Before the federal court cedes control over property of the estate to another court, the movant must show good, proper, and necessary grounds, and that the non-bankruptcy court exercising its jurisdiction will not interfere with the prosecution of the bankruptcy case.

CONTINUANCE

The court continued the hearing to allow the Creditor to address the court's issues. Dckt. 164. The Movant chose not to file any supplemental pleadings.

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 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 for Relief from the Automatic Stay is denied without prejudice.