

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 2, 2023 at 10:00 a.m.

1. [23-20380-E-12](#)
[BRL-1](#)

TIMOTHY WILSON
Mark Wolff

**MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
10-16-23 [\[144\]](#)**

JACK FARAONE VS.

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.

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)(C).

Local Rule 9014-1(f)(2) 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 12 Trustee, parties requesting special notice, and Office of the United States Trustee on October 16, 2023. By the court's calculation, 17 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). Debtor, creditors, the Chapter 12 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 offer 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. At the hearing, -----

<p>The Motion for Relief from the Automatic Stay and/or Motion for Adequate Protection is granted.</p>

JANA Properties, LP and Jack Faraone (“Movant”) seek relief from the automatic stay with respect to Timothy C. Wilson’s (“Debtor”) real property identified as approximately 80 acres of raw land in Pioneer, California, APN 031-360-003 (“Property”). Movant has provided the Declaration of Janet Wright to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made any post-petition payments, with the following post-petition payments past due: \$9,917.60 in post-petition interest up until October 16, 2023, and \$12,770.79 in post-petition legal fees and costs. Declaration, Dckt. 146. Movant states another \$43.12 is due every day beginning on October 17, 2023. *Id.* Movant also provides in its Declaration that the following pre-petition payments are due: \$17,393.00 in pre-petition legal fees and costs, and \$20,916.00 in pre-petition interest. *Id.* Movant requests the court find that this bankruptcy case was “part of a scheme to delay, hinder, or defraud Movants that involved multiple bankruptcy filings affecting the Property under 11 U.S.C. § 362(d)(4). Motion, Dckt. 144.

DISCUSSION

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 \$287,836.76 (Declaration, Dckt. 146), while the value of the Property is determined to be \$375,000.00, as stated in Schedules A/B and D filed by Debtor. Dckt. 1. Movant contends that the Property is closer to the \$400,000 - \$450,000 range, relying on a purported valuation from Debtor’s consultant in this case, Hank Spacone. Declaration, Dckt. 146, p. 6. Movant does not cite to the docket where Mr. Spacone’s valuation can be found.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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 because Debtor and the Estate have not made any post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON

BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 12 debtors are rehabilitated, not reorganized). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or David Burchard (“the Chapter 12 Trustee”), the court determines that there is no equity in the Property for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 12 case.

11 U.S.C. § 362(d)(4)

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor’s inability to reorganize, and unnecessary delays by serial filings. *Id.* Movant states bad faith is present in this case because Debtor has filed six bankruptcy petitions in approximately 13 years.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 12 case in the Eastern District of California was not part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation.

A review of Debtor in Possession’s filings shows he has only filed one previous case in the last year. Case no. 2022-22415. That case was dismissed, in part, because Debtor attempted to navigate the Chapter 12 process *pro se*. Debtor has retained counsel in this current case, addressing that defect in the previous case. However, that does not address the more than a decade of Debtor having bankruptcy relief but not performing the bankruptcy plan.

Before that, there were two Chapter 12 cases filed by Debtor:

1. 15-25059; Filed June 24, 2015, and dismissed on November 24, 2015.
2. 15-29451; Filed December 10, 2015, and dismissed on September 24, 2021.

In both of the 2015 filed cases Debtor was represented by the same counsel as in this Bankruptcy Case.

In Case 15-29542, Debtor confirmed a Chapter 12 Plan. 15-29542; Order, Dckt. 124. The Plan was modified in 2020 and then again in 2021. By Motion filed August 6, 2021, the Chapter 12 Trustee filed a Motion to Dismiss that Bankruptcy Case, asserting a (\$50,000) default in Plan payments for the months of March, April (partial payment), May (partial payment), June (partial payment), July, August, September,

and October 2021. *Id.*; Dckt. 219. Debtor did not oppose the Motion to Dismiss, and Case 15-29542 was dismissed.

Going earlier, Debtor filed his first Chapter 12 case on November 17, 2011, Case 11-47119, which was dismissed on March 27, 2015. Debtor was represented by the same counsel in Case 11-47119 that represents him in this case.

In substance, Debtor has been living under Chapter 12 Plans since November 17, 2011 - which is now more than a decade without performing the confirmed Chapter 12 Plans.

It has been questioned whether Debtor qualifies for Chapter 12 Relief. See, Civil Minutes; Dckt. 54. As it developed, the Debtor's path in this case was to proceed with the prompt sale of his real property and protect any exemption he had in it. At the July 19, 2023 Status Conference, Debtor's counsel reported the independent fiduciary who had been engaged to consider the marketability of the property (and the court thought for the marketing and sale of the property). Civ. Minutes; Dckt. 119. As stated in the Civil Minutes for the July 19, 2023 Status Conference:

At the Status Conference, counsel for the Debtor in Possession has retained Mr. Spacone and has provided his report of value. The low \$2,050,000 and high of \$2,350,000. The Debtor in Possession finds these values to be sufficient to proceed with a plan for liquidation of the real property.

At the hearing, counsel for the Debtor in Possession has retained Mr. Spacone and has provided his report of value. The low \$2,050,000 and high of \$2,350,000. The Debtor in Possession finds these values to be sufficient to proceed with a plan for liquidation of the real property. Counsel for Jana expressed concerns.

Counsel for Umpqua Bank stated that some concerns exist as to the proposed Plan. As to feasibility, it is concerned that the Debtor, as plan administrator, can actually sell the Real Property. Counsel for Jana Properties expressed similar concerns.

The productive discussions continued, with the creditors pressing the point of the need for employment of a professional to take on the responsibilities for the marketing and sale of the Real Properties (in light of Debtor's multiple unsuccessful bankruptcy filings). Some questions were raised about the Debtor's dramatic increase in income, which was stated by counsel being due to the sale of minerals on the Properties.

In the course of the discussions, counsel for Debtor in Possession appeared to acknowledge the need for an independent fiduciary for the Bankruptcy Estate taking over the marketing and sale of the Real Properties - which independent fiduciary would protect the economic interests of not only creditors, but the Debtor, in proceeding with a timely, commercially reasonable, fair market value sale of the Real Properties.

Id.

At the September 21, 2023 Status Conference, the tenor of this case took a turn for the worse, the court stating:

The Trustee's September 14, 2023 Docket Entry Report states that the 341 Meeting of Creditors has been concluded.

At the Continued Status Conference, counsel for the Debtor in Possession reported that they have been working on a Plan, but the Debtor in Possession did not agree with the final version that creditors supported.

The Chapter 12 Trustee believes that this case is one that should be dismissed.

The Creditors supported the Trustee's statement that this case should be dismissed.

The court addressed with Counsel for the Debtor in Possession the issues being raised by the Chapter 12 Trustee and counsel, the statements that motions to dismiss to be filed will request a bar on filing another case by the Debtor in light of the five prior cases that have been filed and dismissed since November 2011, and that at prior hearings the representations from the Debtor in Possession were along the lines of his proceeding with a commercially reasonable sale so he could protect his large California homestead exemption in the real property.

Civil Minutes; Dckt. 133.

Motion to Extend Deadline to Obtain Confirmation

On October 6, 2023, the Debtor filed a Motion to Extend Deadline to Obtain Confirmation of a Chapter 12 Plan in this Case. Motion; Dckt. 135. The Motion notes that the court has already extended the deadline to confirm a Chapter 12 Plan in this case to October 6, 2023, by order entered on July 25, 2023. *Id.*; ¶ 2. Rather than selling the property, Debtor now intends to proceed having mining operations conducted on the property. *Id.*, ¶ 3.

Though having failed for more than a decade of being able to operate any business (whether farming operation or other) and defaulting multiple times, on multiple bankruptcy plans, in multiple bankruptcy cases, Debtor states that he will not proceed with a sale of his property, but instead conduct a mining operation as his farmer reorganization under Chapter 12.

Motion to Dismiss

On October 25, 2023, Umpqua Bank filed a Motion to Dismiss this Bankruptcy Case, and for the court to impose a two year bar on Debtor filing another case (Debtor having continually been in bankruptcy, and having the protections thereof, since 2011). Mtn. Dismiss; Dckt. 151. The Motion includes the following statement of the proceedings in this case:

When the Debtor filed this Case on February 7, 2023, he said that he intended to reorganize and had ability to reorganize by continuing his "farming" operations.

When it became apparent that the Debtor cannot reorganize through his “farming” operations, he said that he wanted to sell his real property. The Court continued the hearing on plan confirmation twice and extended the deadline for plan confirmation three times. After the creditors and the trustee spent significant time and expense working with the Debtor and a marketing and sales consultant, to formulate a plan for selling the real property, the Debtor changed his mind again. Nearly nine (9) months into this Sixth Case, the Debtor says that he wants to mine his real property—a business operation he has never attempted or conducted before. How does he even have the funds to start a mining operation. Moreover, with his poor health, there are serious questions of the Debtor ability to start, manage, and maintain a mining operation during a 60-month plan.

Mtn. Dismiss, p. 2:17 - 3:2; Dckt. 151. Additionally:

On May 8, however, the Debtor filed a liquidating plan, seeking to sell his real property by May 2024. Docket 47 at §7. Relying on this change of mind, the Court continued twice (once to June 28 and second time to July 19) the hearing on the Debtor’s plan confirmation motion. Dockets 86, 87, 103. The Court also continued three times the deadline for obtaining plan confirmation (to July 21, August 31, and then to October 6). Dockets 87, 103, 123. Also relying on this, the creditors (including Umpqua) and the Chapter 12 trustee began working with the Debtor on an amended Chapter 12 plan that would provide for the appointment of Hank Spacone as Plan Administrator, with the authority to sell the Debtor’s real property. On June 22, the Court approved Mr. Spacone’s employment as a consultant to determine the value of the real property. Docket 122; Kraft Decl. ¶¶21-24.

Notwithstanding the foregoing, the Debtor changed his mind once again. In mid September, the Debtor told Umpqua that he no longer wanted to liquidate the real property. Instead, he now wanted to start a mining operation on the real property. Kraft Decl. ¶25. As such, the Debtor is asking now for a fourth (4th) extension of the deadline to obtain plan confirmation. See Docket 135.

Id.; p. 7:19 - 8:8.

The Motion provides a general discussion of the Debtor’s change of heart about selling the property. Also, a history of Debtor’s prior filings, defaults, failures, and cases being dismissed.

~~Therefore, the court finds that proper grounds do exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Movant has provided sufficient evidence concerning bankruptcy cases being filed to prevent actions against the Property. Ultimately, Movant has provided the court with evidence that Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases.~~

Request for Attorneys’ Fees

In the Declaration, almost as if an afterthought, Movant calculates thousands of dollars in attorneys’ fees and requests those fees be part of its secured claim. Declaration, Dckt. 146, p. 5. Neither the Motion nor Declaration alleges any contractual or statutory grounds for such fees, but instead appears to assume the fees as a given. No evidence is provided of Movant having incurred any attorneys’ fees or

having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees. The court is not inclined to do either.

**Federal Rule of Bankruptcy Procedure 4001(a)(3)
Request for 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. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 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 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 JANA Properties, LP and Jack Faraone ("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 vacated to allow Movant, 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 that is recorded against Timothy C. Wilson's ("Debtor") real property identified as approximately 80 acres of raw land in Pioneer, California, APN 031-360-003 ("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 to obtain possession of the Property.

~~**IT IS FURTHER ORDERED** that the above relief is also granted pursuant to 11 U.S.C. § 362(d)(4), which further provides:~~

~~"If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a~~

~~debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording."~~

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

No other or additional relief is granted.