Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
November 07, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 19-13714-MKN
	)	Chapter 11
VICTOR A. SORIANO aka VICTOR A. SORIANO-FLORES dba NESSI CLEANING SERVICE, INC. and MARIBEL E. SORIANO aka MARIBEL E. SANTILLAN,	)	Date: October 30, 2019
	)	Time: 9:30 a.m.
Debtors.	)	

ORDER ON MOTION FOR IN REM RELIEF FROM THE AUTOMATIC STAY[1]

On October 30, 2019, the court heard the Motion for In Rem Relief From the Automatic Stay ("RAS Motion"), brought by The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2007-OA3 Mortage Pass-Through Certificates, Services 2007-OA3; Bayview Loan Servicing, LLC, as servicer ("BONY"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On June 11, 2019, a voluntary Chapter 11 petition was filed by Victor A. Soriano and Maribel E. Soriano ("Debtors"). (ECF No. 1). At the time they commenced the instant Chapter 11 proceeding, Debtors were in a previously filed proceeding denominated Case No. 17-11472-MKN ("2017 Case"). Debtors also filed three previous Chapter 11 cases, all of which were

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. § 101, et seq.

dismissed: Case No. 11-23322-MKN; Case No. 13-14770-MKN; and 16-10429-MKN ("2016 Case"). The 2017 Case was dismissed by an order entered on August 19, 2019. (2017 ECF No. 91). The 2016 Case was dismissed by an order entered on January 11, 2017. (2016 ECF No. 90).

In all five of their Chapter 11 proceedings, Debtors' schedules of assets includes certain real estate located at 8660 Giles Street, Las Vegas, Nevada 89123 ("Giles Property"). In Schedules "A/B" and "D" of their current case, Debtors attest that the Giles Property has a current market value of $508,690, and that the holder of the first mortgage against the property is owed $587,490.79. (ECF No. 18). In none of the first four Chapter 11 cases did the Debtors file a proposed plan of reorganization or accompanying disclosure statement.

On September 9, 2019, Debtors filed a proposed Chapter 11 plan of reorganization ("Plan") along with a proposed Chapter 11 disclosure statement ("Disclosure Statement"). (ECF Nos. 65 and 66).

On September 16, 2019, an order was entered granting in rem relief from stay under Section 362(d)(4) in favor of creditor U.S. Bank, N.A., with respect to certain real estate located at 62 East Ford Avenue, Las Vegas, Nevada 89123. (ECF No. 75).

On September 26, 2019, BONY filed the instant RAS Motion. (ECF No. 84). It was noticed to be heard on October 30, 2019. (ECF No. 85).

On October 3, 2019, BONY filed objections to confirmation of the proposed Plan as well as approval of the proposed Disclosure Statement. (ECF Nos. 90 and 91).

On October 16, 2019, Debtors filed an opposition to the RAS Motion ("Opposition"). (ECF No. 92).

DISCUSSION

BONY maintains that the automatic stay in the current case expired on July 11, 2019, because the Debtors failed to obtain an extension of the automatic stay as required by Section 362(c)(3)(C)(i). See RAS Motion at 8:9-17. Additionally, BONY argues that relief from stay is appropriate under Sections 362(d)(1), (d)(2) and (d)(4), as well as 362(n). It represents that the

Giles Property is worth $508,690.00 according to the Debtors' own Schedule "A/B"[2] and that BONY currently is owed $651,750.63. See RAS Motion at 4:11-28. BONY also alleges that the Debtors have not made a payment on the underlying promissory note since May 1, 2011, i.e., for more than eight years. Attached to the RAS Motion are copies of a variety of unauthenticated documents evidencing the underlying obligation and the lien against the Giles Property, none of which are objected to by the Debtors.

Debtors' written response is minimal. They do not dispute any of the values or claim amounts alleged in the RAS Motion, or that they have no equity in the Giles Property. Debtors argue that the automatic stay did not terminate under Section 362(c)(3) because they filed their current case while the 2017 Case was still open. See Opposition at 2.

Having considered the written and oral arguments and representations of counsel, together with the record, the court concludes that the RAS Motion should be granted.

With respect to whether the automatic stay terminated in the current case on July 11, 2019, the pertinent language refers to a case of the debtor that "was pending within the preceding 1-year period but was dismissed…" 11 U.S.C. § 362(c)(3). Clearly the 2017 Case was pending within the preceding year, but the dismissal occurred after the preceding one-year period. Assuming for the purposes of the instant case that the automatic stay has not expired in the current case both as to the Debtors and as to property of the estate, see Reswick v. Reswick (In re Reswick), 446 B.R. 362, 373 (B.A.P. 9th Cir. 2011), however, the court concludes that relief from stay otherwise is appropriate.[3]

---

[2] BONY requests that the court take judicial notice of the Debtors' schedules filed in the case. See RAS Motion at 10 n.5. It also requests that the court take judicial notice of a fair market value figure of $330,000 alleged in the Disclosure Statement. Both the values set forth in the Schedules and the Disclosure Statement are less than the amount claimed by BONY.

[3] Because the court otherwise concludes that relief from stay is appropriate, it is unnecessary to determine whether Section 362(n)(1) precluded the automatic stay from arising because the 2017 Case was still pending at the time the current case was commenced. The Chapter 11 petition filed in the 2017 Case included a designation that it was a small business proceeding. On September 1, 2017, however, an order was entered granting the Debtors' request under Section 1121(d)(1) to extend the 120-day exclusivity period arising under Section 1121(b). (ECF No. 55). The latter period does not apply in small business cases.

Section 362(d)(1) requires the moving party to establish "cause" for relief from stay, including a lack of adequate protection. Ordinarily, the moving party must demonstrate that the subject property has declined in value since the bankruptcy was filed. See First Federal Bank of California v. Weinstein (In re Weinstein), 227 B.R. 284, 296-97 (B.A.P. 9th Cir. 1998). Upon such proof, the debtor must provide some form of "adequate protection" to ensure that the automatic stay does not worsen the value of the creditor's secured claim allowed as of the petition date. Under Section 361(1), adequate protection typically consists of a cash payment equal to the decrease in value of the claim. But cause for relief from stay under Section 362(d)(1) is not restricted to a lack of adequate protection.

In this instance, Debtors have filed five separate Chapter 11 petitions over an eight-year span and never filed a proposed Chapter 11 plan of reorganization in their four previous cases. In the 2017 Case, an order was entered on August 19, 2019, granting BONY's motion to dismiss the reorganization proceeding for cause under Section 1112(b). (2017 ECF No. 91). In the 2016 Case, an order was entered on January 11, 2017, granting the motion of the Office of the United States Trustee ("UST") to dismiss the Chapter 11 case for cause under Section 1112(b). (2016 ECF No. 90). In other words, in their two most recent Chapter 11 proceedings, the Debtors never filed a proposed plan of reorganization and orders were entered in both cases dismissing the reorganization proceedings for cause under Section 1112(b). Under this combination of circumstances, the court concludes that cause exists under Section 362(d)(1) to terminate the automatic stay with respect to the Giles Property.

Section 362(d)(2) requires the moving party to establish that the debtor lacks equity in the subject property and that the property is not necessary to an effective reorganization. If the moving party meets its burden under Section 362(g)(1) of establishing the lack of equity, the burden shifts to the respondent under Section 362(g)(2) to establish that the property is necessary to an effective reorganization. The latter element requires the responding party to demonstrate that there is a reasonable possibility of a successful reorganization within a reasonable amount of time. See United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 376 (1988).

In this instance, Debtors concede that they lack equity in the Giles Property, see Opposition at 2, but allege that the subject property is generating a positive cashflow. Id. No evidence is offered to demonstrate that cashflow, but the Debtors' operating reports filed in the case attest that they collected $210 of net rents for the Giles Property in June 2019, $1,769 of net rents in July, $49 of net rents in August, and $242 in net rents in September. (ECF Nos. 30, 57, 81, and 94). Even if the court considers the Debtors' operating reports filed under penalty of perjury, however, they have failed to meet their burden of demonstrating a reasonable possibility of a successful reorganization. Because the Debtors have been in five different Chapter 11 proceedings over the past eight years, there also is no basis to conclude that their efforts to reorganize will be successful within a reasonable amount of time. Under these circumstances, the court concludes that relief from stay is appropriate under Section 362(d)(2).

Section 362(d)(4) authorizes in rem relief from stay in favor of a party secured by an interest in real property "if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved…multiple bankruptcy filings affecting such real property." 11 U.S.C. § 362(d)(4)(B). An order granting relief under Section 362(d)(4) that is recorded in the county where the real property is located is "binding in any other [bankruptcy] case…purporting to affect such real property" for a period of two years. See 11 U.S.C. § 362(d)(4).

There is no question that the Debtors have filed five separate Chapter 11 proceedings affecting the Giles Property. In the 2016 Case, the UST obtained dismissal of the Debtors' third reorganization attempt only for creditors to be delayed by the Debtors' fourth attempt. In the 2017 Case, BONY obtained dismissal of the Debtors' fourth reorganization attempt only to be delayed by the Debtors' latest attempt. The term "scheme" as used in Section 362(d)(4) is not defined, but some courts have required the moving party to demonstrate the existence of "an artful plot or plan." See, e.g., Lira v. Wells Fargo Bank, N.A. (In re Lira), 2015 WL 4641600, at *6-7 (B.A.P. 9th Cir. Aug. 4, 2015).

It is self-evident that any bankruptcy filing could be characterized as a plan to delay or hinder a creditor because that is exactly what results from filing any bankruptcy petition: the

automatic stay arises. See 11 U.S.C. § 362(a) ("a petition filed under section 301, 302 , or 303 of this title..operates as a stay…"). Without the automatic stay, a creditor can continue or commence collection of its claim immediately and without impediment. But not every bankruptcy filing can be characterized as fraud, even though disgruntled creditors may think so. Thus, a scheme under Section 362(d) does not appear to require proof of some nefarious intent by the debtor. Rather, Section 362(d)(4) only appears to require evidence of a plan to delay or hinder a creditor through multiple bankruptcies affecting the same real property.

Under the circumstances of this case, the Debtors have delayed BONY on multiple occasions from pursuing its foreclosure remedies under its deed of trust. Debtors do not dispute that they have made no payments for more than eight years, yet they have filed four previous Chapter 11 cases without ever proposing a plan of reorganization. As to their current Chapter 11 case, Debtors have only filed a proposed Plan and a proposed Disclosure Statement, but have offered no evidence suggesting that either matter will be confirmed or approved. Additionally, that the Debtors have filed successive Chapter 11 petitions after BONY obtains dismissal of the case or similar relief is obtained by the UST, infers that the successive case is intended to hinder the efforts of BONY and all other creditors to exercise their rights under nonbankruptcy law. In rem relief under Section 362(d)(4) with respect to the Giles Property, therefore, is appropriate.

IT IS THEREFORE ORDERED that Motion for In Rem Relief From the Automatic Stay, brought by The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust2007-OA3 Mortage Pass-Through Certificates, Services 2007-OA3; Bayview Loan Servicing, LLC, as servicer, Docket No. 84, be, and the same hereby is, **GRANTED.**

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
VICTOR A. SORIANO
MARIBEL E. SORIANO
7450 S. EASTERN AVENUE, SUITE 1092
LAS VEGAS, NV 89123

# # #