



1 because the debt on the home exceeds the debt ceiling for  
2 eligibility for Chapter 13 under 11 U.S.C. § 109.

3 On or about June 1, 2007 Movants, as holders of the second  
4 trust deed on the property, filed for relief from automatic  
5 stay, asserting both lack of adequate protection under  
6 11 U.S.C. § 362(d)(1) and lack of equity and unnecessary for  
7 reorganization under § 362(d)(2).

8 This Court has subject matter jurisdiction pursuant to  
9 28 U.S.C. § 1334 and General Order No. 312-D of the United States  
10 District Court for the Southern District of California. This is  
11 a core proceeding under 28 U.S.C. § 157(b)(2)(G).

12 In support of the motion, movants filed the declaration of  
13 Sam Pope, which purported to set out the amounts of debt on the  
14 property. Debtor objected to the declaration on multiple  
15 grounds. A Supplemental Declaration was later filed, and no  
16 objections have been raised as to it. World Savings holds the  
17 senior secured interest on the property, and filed a proof of  
18 claim on May 29, 2007 for \$1,058,819.64. The total unpaid  
19 balance on the Movants' second position note and trust deed is  
20 \$1,427,727. There is a third position note held by Mr. Pope,  
21 with an unpaid balance of \$45,600, also secured by a trust deed.  
22 Citibank has a recorded judgment lien for \$8,467.04, and there is  
23 a fourth trust deed securing a note to La Jolla Cove Investors  
24 for \$50,000. Thus, the total debt on the property, according to  
25 the present uncontroverted record, is \$2,590,613.68. Debtor  
26 claims the property is worth \$3,000,000 and supplied an appraisal

1 supporting that number, while Movants submitted an appraisal  
2 fixing the market value at \$2,600,000.

3       According to the Pope declaration, the Wrobels "were having  
4 cash flow problems" in May 2005. The Wrobels were to make  
5 regular payments to World Savings, the senior lienholder, to  
6 improve their credit score, so the Wrobels could qualify for a  
7 more favorable conventional loan. To bolster those efforts, the  
8 third place loan was made in December 2005 through the Wrobel's  
9 daughter. In 2006, the Wrobels did not make on-time regular  
10 payments to World and conventional refinancing was therefore  
11 unavailable.

12       Meanwhile, the Wrobels were in default on the second place  
13 loan as of March 15, 2006, and a Notice of Default was recorded  
14 August 16, 2006. The Wrobels wanted to delay the publication of  
15 the Notice of Sale to facilitate the sale or refinance of the  
16 property, and a Forbearance And Release Agreement was entered  
17 into on or about December 21, 2006. That Agreement postponed  
18 publication of the Notice of Sale until after January 31, 2007,  
19 and further provided there would be no sale until after February  
20 21. Moreover, the lenders agreed to a reduced payoff on the loan  
21 if it was paid prior to January 31, 2007.

22       Then, around February 1, 2007 the Wrobels and the second  
23 trust deed holders agreed to an Addendum extending the  
24 publication date until after February 15, and the sale date to  
25 after March 15, for an extension fee.

26 ///

1 Suffice it to say, no sale or refinance of the property  
2 occurred and, as noted, on March 16, 2007 Mrs. Wrobel filed the  
3 instant petition.

4 One side issue has briefly arisen. In the opposition to the  
5 relief from stay motion, debtor urged that there were Truth-in-  
6 Lending violations which would affect the Movants' lien claim.  
7 Her non-bankruptcy attorney declared that she had sent a demand  
8 for rescission of the second loan transaction. Movants'  
9 attorney, Mr. Stoffel responded that the rescission demand was  
10 rejected, in part, because the Wrobels did not tender the monies  
11 owed to restore the Movants to the *status quo ante*. Mr. Stoffel  
12 also supplied another copy of the Forbearance And Release  
13 Agreement, which contained mutual releases between the Wrobels  
14 and the Movants. In subsequent proceedings, the issue was not  
15 pressed, perhaps because of the releases, or because of the  
16 applicable law. See Yamamoto v. Bank of New York, 329 F.3d 1167  
17 (9<sup>th</sup> Cir. 2003).

18 The Court held an evidentiary hearing to consider the  
19 testimony of the two appraisers to try to ascertain the answers  
20 to the questions posed by the motion. As noted, Mrs. Wrobel's  
21 appraiser concluded that the property was worth \$3,000,000, while  
22 the Movants' appraiser said \$2,600,000. Neither side discussed  
23 the impact of the costs of a sale or the analysis. See La Jolla  
24 Mortgage Fund v. Rancho El Cajon Assoc., 18 B.R. 283 (Bankr. S.D.  
25 CA 1982); In re Bach, 2007 WL 39342 (Bankr. D.Az. 2007). It is  
26 clear that commissions and costs come off the top of revenues

1 generated by a sale, whether a voluntary sale by the debtor or  
2 one occasioned by a foreclosing creditor. In either instance, in  
3 calculating adequate protection of a lienholder, those expenses  
4 should be considered. In this district, absent evidence to the  
5 contrary, it has been the practice to use 8% of the selling price  
6 as the assumed costs of sale, including commissions, where the  
7 property is a single family residence. At a sale price of  
8 \$3,000,000, such costs are \$240,000, while at \$2,600,000 they are  
9 \$208,000.

10  
11 Adequate Protection

12 For purposes of analysis of adequate protection under  
13 § 362(d)(1), the Court looks only to the Movants' obligation and  
14 to any liens and charges senior to it. Liens junior to the  
15 Movants' are not considered in assessing any value cushion junior  
16 to the Movants' position. So the value that needs to be  
17 protected is the combination of the World Savings lien, Movants'  
18 lien, and the costs of sale. That is \$2,486,546.64 plus costs of  
19 sale- \$208,000 - \$240,000, depending on the sale price. That  
20 suggests a range from \$2,694,546 to \$2,726,546.

21 Debtor has not offered to make any interim payments to  
22 Movants. Indeed, the motion states the last payment to Movants  
23 was made in February, 2006 (aside from the consideration for the  
24 Addendum to the Forbearance Agreement). Debtor does offer,  
25 however to make payments to World Savings to ostensibly protect  
26 Movants. Debtor also proposes a period of time to market and

1 sell or refinance the property, or otherwise bring the loan  
2 current. Debtor offers to agree to a deadline of January 20,  
3 2008, which is just over ten additional months from the  
4 bankruptcy filing. At the evidentiary hearing on July 26, 2007,  
5 counsel for Debtor advised the Court that the Debtor had been  
6 meeting with a broker and intended to list the property at a  
7 price over \$3,000,000. The case is over four months old and no  
8 broker has been employed as yet.

9  
10 Absence of Equity and Necessity for  
11 Reorganization

12 In contrast to the adequate protection analysis, in  
13 calculating equity under § 362(d)(2) all the debt on the property  
14 is included, including junior debt (with the possible exception  
15 of judgment liens that might be avoidable if they impair a  
16 homestead exemption). To calculate equity, then, the junior  
17 liens of \$45,600, \$8,467.04, and \$50,000 are added to the  
18 previously discussed range of values to be protected. As noted,  
19 total debt on the property is \$2,590,613.68. Adding the costs of  
20 sale yields a range of \$2,798,613.68 to \$2,830,613.68.

21 Necessity for reorganization is a required element for any  
22 analysis under § 362(d)(2), and Debtor has the burden of proof on  
23 the issue pursuant to § 362(g). Here, Debtor asserts it is her  
24 home, which she shares with her husband and four children.  
25 According to her Schedule J, the debt service on the house alone  
26 is \$22,664 (Schedule J says property taxes are not included,

1 while Debtor's declaration indicates property taxes are impounded  
2 monthly in the World Savings loan payments). The Court  
3 recognizes that maintaining a family home can be an important  
4 component of reorganizing one's financial circumstances.

5  
6 Value of the Home

7 As noted, Movants' appraiser, Mr. Feinstein, arrived at a  
8 value of \$2,600,000, while Debtor's appraiser, Mr. Smith says  
9 \$3,000,000. After listening to the testimony and reviewing the  
10 respective written reports of appraisal, the Court concludes  
11 there is not a lot to distinguish between the two.

12 One area of difference the Court considers significant is  
13 marketing time. Mr. Feinstein allowed for a under 3 months of  
14 marketing, while Mr. Smith considered 3 - 6 months as his  
15 guidepost. The more compressed the marketing time, often a  
16 lower selling price will result.

17 Mr. Feinstein believed the Wrobel home had a total of  
18 8 rooms, with 5 bedrooms, while Mr. Smith believed there was a  
19 clear distinction between the kitchen and family room so there  
20 are 9 rooms, not 8. Mr. Smith testified that would require a  
21 \$20,000 upward adjustment on the value of the Wrobel home.

22 Both appraisers looked closely at a March, 2007 sale of a  
23 house on the same street, and both considered it a strong  
24 comparable. The home sold for \$2,850,000. Mr. Feinstein  
25 believed the comparable was superior to the Wrobels' in having an  
26 extra full bath, almost 800 more square footage, and a superior,

1 recent renovation. Mr. Smith used a lesser square footage based  
2 on the legal description and permits, but did not actually get to  
3 see the inside of the house. The Wrobels have a spa and superior  
4 landscaping, a better site, but not as good a view. Mr. Smith's  
5 net adjustment was one tenth of one percent downward, to an  
6 adjusted value of \$2,846,000, while Mr. Feinstein adjusted the  
7 comparable down about 7%, to \$2,651,400.

8 After considering the foregoing, reviewing both appraisers'  
9 other comparable sales, as well as their testimony the Court  
10 finds and concludes that a probable market value for the Wrobel  
11 home marketed over a reasonable period of time - more likely the  
12 3 - 6 month range - is \$2,850,000.

#### 13 14 Adequate Protection

15 Having found a value of \$2,850,000, costs of sale at 8%  
16 would be \$228,000. When added to Movants' lien and World Savings  
17 senior debt, the total is \$2,714,546.64. That leaves a value  
18 cushion of \$135,453.36, or just under five per cent to protect  
19 Movants' while the debt owed to them continues to grow at  
20 something like \$13,000 per month.

21 Given that the valuation process is not an exact science, as  
22 Debtor's appraiser testified, the Court is unable to conclude  
23 that the combination of a value cushion just under five percent,  
24 coupled with payments to the senior creditor but none to keep the  
25 value cushion from eroding affords the Movants adequate  
26 protection within the meaning of 11 U.S.C. § 362(d)(1).

1 Turning to the analysis under § 362(d)(2), the total debt  
2 plus 8% costs of sale is \$2,818,613.68, leaving \$31,386.32 - 1.1%  
3 - of total equity, which would evaporate in a few months of non-  
4 payment of Movants' and the junior debt service. There is no  
5 meaningful equity in the property to preserve.

6 That finding and conclusion carries over to the analysis of  
7 necessity for reorganization. That requirement has been  
8 interpreted by the courts to mean the debtor must show a  
9 reasonable prospect of reorganization occurring within a  
10 reasonable period of time. The Debtor has failed to so show. To  
11 the contrary, the uncontroverted record is that Debtor and her  
12 husband have been struggling with this residential property for  
13 some time, have been in default for over a year, have been unable  
14 to refinance in that time, including two forbearance periods and  
15 a reduced payoff to these Movants. Then the bankruptcy is filed,  
16 and over four months later Debtor is proposing to employ a broker  
17 to sell the property at a listing price in excess of the values  
18 testified to, all while asking the lienholders junior to World  
19 Savings to continue to accrue debt, thus eliminating whatever  
20 sliver of protection they might otherwise have had.

21  
22 Conclusion

23 Based on the pleadings, testimony, documentary evidence and  
24 argument, the Court concludes relief from the automatic stay of  
25 11 U.S.C. § 362 should be, and hereby is granted both for lack of  
26 adequate protection, and because there is no meaningful equity in

1 the property and Debtor has not shown that the property is  
2 necessary for reorganization.

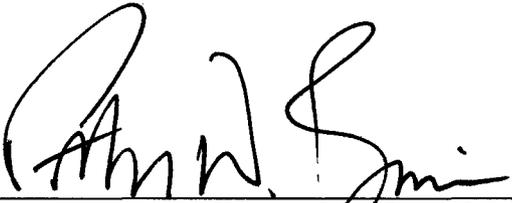
3 In their motion, Movants have asked for extraordinary relief  
4 in addition to relief from the stay. They ask for 180 day  
5 prospective relief as to any future bankruptcies in that time,  
6 and they ask for it against both Debtor and her non-filing  
7 spouse. Such relief is a form of *in rem* relief, which requires  
8 specific findings. Movants have offered only speculation, and no  
9 evidence, to support such relief. If there is a future  
10 bankruptcy, it will be addressed on the circumstances that then  
11 exist.

12 Movants also ask for relief for all junior lienholders.  
13 None of the enumerated lienholders is a movant, and Movants have  
14 not shown they have standing to assert the interests of any  
15 junior lienholder. Even as to the third trust deed, held by Mr.  
16 Pope, he apparently chose to go forward as one of the Movants on  
17 the second trust deed, but not to join the motion on behalf of  
18 the third position lien.

19 For the foregoing reasons, Movants' request for  
20 extraordinary relief is denied. Relief from stay, however, is  
21 granted.

22 IT IS SO ORDERED.

23 DATED: AUG - 3 2007

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26   
PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court