WRITTEN DECISION - NOT FOR PUBLICATION

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SOUTHERN DISTRICT OF CALIFORNIA
BY /15 DEPUTY

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re PATRICIA MARIE CASEY, Debtor.	Case No. 10-00367-LA13 R/S No. RTL-1 ORDER ON MOTION FOR RELIEF FROM STAY
CHRISTINE GRANDSTAFF, her successors and/or assigns, Movant, v. PATRICIA MARIE CASEY, MARY J. JONES, THOMAS H. BILLINGSLEA, JR., Chapter 13 Trustee, Respondents.	

Creditor Grandstaff moved for relief from stay in the instant case primarily arguing that relief should be granted because debtor was ineligible for discharge in this Chapter 13 case because debtor had received a Chapter 7 discharge within the preceding year, triggering the prohibition of 28 U.S.C.

§ 1328(f). That argument was addressed in an earlier decision in this case (Casey 1), and the balance of the motion was continued for further consideration. After hearing additional argument at the continued hearing, the motion was taken under submission.

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

The saga of this case began on July 20, 2007 as far as the court's involvement is concerned. On that date, debtor filed her first Chapter 13 petition. In her Schedule D, debtor listed a senior mortgage lien on her residence held by AMC Mortgage in an amount of $263,581, incurred in December 2003. She also listed a junior lien of Ms. Grandstaff, incurred in March 2007, in the amount of $20,000. Debtor listed the value of the property at $575,000. She also listed a disputed claim of John Fredericks which arose from a notice of levy in October, 2006, in the amount of $218,000. It appears that AMC Mortgage had commenced foreclosure on its senior lien, precipitating the filing.

After somewhat protracted proceedings, debtor's Chapter 13 plan was confirmed on or about January 16, 2008. Then, around April 8, 2009 the Chapter 13 Trustee moved to dismiss the case for failure to make payments. Debtor did not oppose the motion, and an order dismissing was entered May 18, 2009. Debtor's plan had set out both to cure the arrears to AMC Mortgage, and to pay

the entire debt to Ms. Grandstaff at $430 per month for the life of the plan.

Debtor changed attorneys to her current counsel and on June 17, 2009 filed a "barebones" Chapter 7 petition. On July 2, 2009 she filed the balance of her Schedules. In Schedule D, debtor stated the December 2003 mortgage was held by Chase and had fallen to second position. The balance due was $236,276, but the value of her interest in the property had dropped to $188,000. As in the prior case, debtor was listed in Schedule A as having a 50% interest in the property, with her sister holding the other 50%.

Also on Schedule D, debtor listed Ms. Grandstaff's mortgage lien as being in 3rd position, behind Chase in 2nd position. No holder of a 1st position mortgages is listed. Debtor again listed a lien claim of Mr. Fredericks at $218,000, incurred in October 2006, but this time the claim was not marked as disputed. In her Chapter 7 Individual Debtor's Statement of Intentions, filed with her Schedules, debtor stated as to Ms. Grandstaff's claim: "Debtor will retain collateral and continue to make payments" (emphasis in original). Debtor was not living in the subject property at the time of filing her Chapter 7 petition, and according to her response to question 15 in her Statement of Financial Affairs, she last lived there in December 2007, 18 months prior to filing. She reported she lived elsewhere in the year after December 2007, before moving to her residence address where she lived on the date of filing her Chapter 7.

Yet in her Schedules she listed the subject property, located in Julian, California as her primary residence.

On August 14, 2009 Ms. Grandstaff filed a motion for relief from stay. The senior lien holder had already been granted relief, putting Ms. Grandstaff's interest at risk of being foreclosed out. In support of her motion she filed a declaration, asserting she was in 2nd position, and that debtor made no payments on the underlying loan since it was made in March, 2007. Debtor filed no opposition to the motion and a noncontested order for relief from stay was entered on September 3, 2009. That order provided in part that it was "effective despite any conversion to any other Chapter".

On September 28, 2009 debtor filed amendments to Schedules D and F, moving Mr. Frederick's claim from Schedule D where it had been listed as secured, to Schedule F, listing it as unsecured. The Chapter 7 Trustee filed a report of no distribution on September 30, 2009, and on November 4 the case was closed without discharge because debtor had failed to file her proof of completion of the requisite "Instructional Course Concerning Personal Financial Management". Debtor promptly moved to reopen the case so she could file the financial management course certificate, which she did. On December 29, 2009 debtor received her Chapter 7 discharge, and on January 4, 2010 the case was reclosed.

On January 12, 2010 debtor filed the instant Chapter 13 petition, without supporting Schedules ("barebones"). On

January 26, she filed her Schedules, listing the subject property as her primary residence and now asserting a value of $230,000. No longer did she claim only a 50% interest in the property. Chase Mortgage was identified as the first position mortgagee with a balance of $236,276. Ms. Grandstaff was listed in second position with a balance of $31,146, and debtor indicated she intended to seek a lien strip of Ms. Grandstaff's claim. No creditors were listed on Schedule F, presumably because they had all been discharged in the Chapter 7, including Mr. Fredericks.

In her Chapter 13 Statement of Current Monthly Income, debtor claimed an expense deduction of $519.11 to Ms. Grandstaff in Subpart C as a future payment on a secured claim, notwithstanding debtor's intent to strip off the lien and make no such payments. Debtor's initial plan filed January 26 contemplated paying the trustee $2,050 per month, $1,767 of which was designated for payment to Chase to cure $26,733 in arrears (which would take just over 15 months). Unsecured creditors were proposed to receive 15% of their claims or a *pro rata* share of $4,628.30. Paragraph 19 of the plan stated:

> Debtor will bring valuation motion to determine value of residence below first trust deed and lien strip motion to confirm that the junior trust deed held by Christine Grandstaff is completely undersecured and will be voided upon plan completion pursuant to 11 USC 1322.

Debtor acknowledged on her Statement of Current Monthly Income that her applicable commitment period was 5 years.

On February 4, 2010 Ms. Grandstaff filed the instant motion for relief from stay. The core of the motion was that because debtor was ineligible for a discharge because of 11 U.S.C. § 1328(f), she could not avail herself of the lien strip mechanism of 11 U.S.C. § 1322(b). This Court addressed that contention at length in the Order filed April 19 2010. In that Order the Court continued the balance of the motion to the date set for hearing debtor's lien strip motion on Ms. Grandstaff's claim.

Ms. Grandstaff's motion for relief noted that apparently Mr. Frederick's $218,000 claim had reappeared, and was now in 1st position, ahead of both Chase and Ms. Grandstaff. Ms. Grandstaff filed a supporting declaration reiterating that debtor had never made any payment on the obligation since it was incurred in March 2007. On February 9, 2010 debtor filed amendments to Schedule D, adding Benchmark Medical Consultants (and Fredericks) as a secured creditor because of a 2003 abstract of judgment. Debtor signaled she intended to try to strip off that claim, as well. That same date she filed an amended plan, still proposing to pay the trustee $2,050 per month with $1,767 going to Chase each month to cure her arrears. She also proposed the same distribution to unsecured creditors as before. Paragraph 19 was revised to read:

> Debtor will bring valuation motion to determine value of residence below first trust deed and lien strip motion to confirm that the abstract of judgment of Benchmark Medical Consultants, Inc. and the junior

> trust deed held by Christine Grandstaff are completely undersecured and will be voided upon plan completion pursuant to 11 USC 1322.

Debtor did file a motion to avoid Ms. Grandstaff's lien and noticed it for hearing. However, at the hearing on May 11, debtor withdrew that motion, indicating an intent to refile it relying on 11 U.S.C. § 506(a) and (d), and not 11 U.S.C. § 1322. No such motion has since been filed as to Ms. Grandstaff's lien claim.

Section 362(d) of Title 11, United States Code, provides in pertinent part:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -
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> (1) for cause, including the lack of adequate protection of an interest in property of such a party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if -
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization; . . ..

When debtor filed this latest bankruptcy petition, Ms. Grandstaff held a lien claim against the subject property which, under applicable nonbankruptcy law, was secured by a recorded deed of trust granted consensually by debtor. Ms. Grandstaff had a legally cognizable interest in the

subject property, with its attendant bundle of rights. Nobelman v. American Savings Bank, 508 U.S. 324, 329 (1993). Ms. Grandstaff has been stalled since July 20, 2007 from enforcing any of those rights - almost three full years - without any payments on the underlying debt. Ms. Grandstaff continues to be threatened with motions to void her lien interest against the property and having to expend funds to protect her interest, all the while facing the possibility that her lien interest, granted consensually by debtor for full consideration, will be lost to foreclosure by a creditor senior in priority to her.

Based on the record before the Court, the Court finds that Ms. Grandstaff has not been provided with adequate protection of her interest in the subject property. Although debtor represented she intended to make payments earlier in this process, none have been made since the loan was made almost three years ago. Accordingly, relief from stay is warranted, and is granted pursuant to 11 U.S.C. § 362(d)(1).

Further, it is clear that debtor has no equity in the subject property, regardless of who is in senior position, or whether debtor will prevail on her motion to avoid the judicial lien of Benchmark pursuant to 11 U.S.C. § 522. Moreover, as already noted, debtor filed this case listing a residence miles away from the subject property. There is no evidence that the subject property generates revenue to help fund this estate, or that it is otherwise necessary for an effective reorganization.

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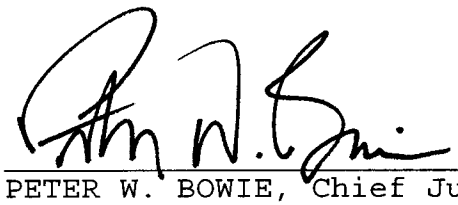
Accordingly, relief from stay is also warranted pursuant to § 362(d)(2) and is therefore granted.

Conclusion

For the foregoing reasons, the Court finds and concludes that Ms. Grandstaff should have relief from the automatic stay to pursue enforcement of her lien interests against the subject property if she should choose to do so. Relief is granted pursuant to 11 U.S.C. § 362(d)(1) and (d)(2).

DATED: JUN 24 2010



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court