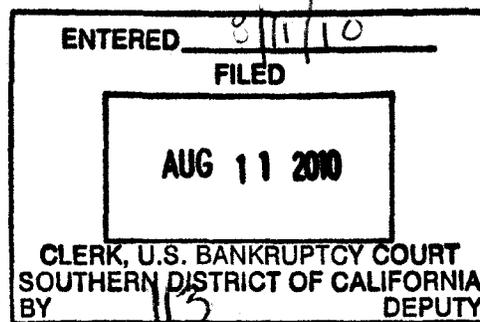


WRITTEN DECISION - NOT FOR PUBLICATION



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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

<p>In re:</p> <p>STEVEN STEIN,</p> <p style="padding-left: 100px;">Debtor.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Bankruptcy No. 10-03458-LA</p> <p>Chapter 13</p> <p>MEMORANDUM DECISION – ORDER ON MOTION FOR RELIEF FROM STAY</p>
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Before the Court is the Motion for Relief from Stay filed by Movant Bank of America on July 7, 2010 (the “Motion”). Movant seeks relief on the grounds that Movant’s interest is not adequately protected, or alternatively that the Debtor has no equity in the property and it is not necessary for an effective reorganization. This matter came on for hearing on August 3, 2010 at 10:00 a.m. and was continued to August 13, 2010 at 2:00 for telephonic status conference.

**BACKGROUND**

Steven Stein (“Debtor”) filed his Chapter 13 petition on March 3, 2010. On June 4, 2010, the Debtor filed a Declaration with Respect to Real Property in response to the Chapter 13 Trustee’s request at the April 30<sup>th</sup> Meeting of Creditors. The Debtor stated that he jointly owns two real properties with Susan Corl. The property which is the subject of

1 the Motion is a single-family house located at 5112 Whistlers Bend Way, El Dorado Hills,  
2 California (the "Property").

3 The Debtor obtained two loans from Movant Bank of America NA for the purchase  
4 of the Property and the construction of a swimming pool in the backyard. According to the  
5 Motion, the amount owed on the senior lien is the principal amount of \$416,872.77 and  
6 delinquencies of \$69,198.95 (of which \$28,139.04 are arrears, \$32,669.11 are escrow  
7 advances). In addition there is a Bank of America second lien for \$157,982.00, and three  
8 mechanics' liens related to the construction of the pool which total \$21,019.00 .

9 The Property is valued at \$500,000.00 in the Debtor's schedules and in the Motion.  
10 Movant later filed a Broker's Price Opinion on August 5, 2010 which values the Property at  
11 \$445,000.00.

12 The Debtor is involved in litigation with Movant and the mechanic lien holder El  
13 Dorado Custom Pools over the Property. That litigation has been removed from the state  
14 court and transferred to this Court, as Adversary Proceeding No. 10-90305-LA, along with  
15 related litigation Adversary Proceeding No. 10-90307-LA. In the litigation, the Debtor  
16 alleges claims against Movant for failing to release \$60,000 in escrow funds for the  
17 construction of the pool. The construction of the pool has not been completed, and the  
18 Property is currently vacant. The Debtor would like to rent the Property upon completion of  
19 the pool to generate cash to fund his reorganization.

20 The Debtor opposes the Motion, and argues that granting relief from stay would  
21 render any cross-claim judgment ineffective. Further, the Debtor argues that even if the  
22 Court finds there is no equity in the Property, the Property is necessary for an effective re-  
23 organization.

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### DISCUSSION

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The Debtor asserts that his cross-claim against Movant, and his potential right of set-off, should be considered by the Court in this Motion, which would presumably be a factor

1 in determining if there is any equity in the Property. Movant argues these claims should not  
2 be considered under the holding of the Ninth Circuit in *In re Bialac*, 694 F.2d 625 (9<sup>th</sup> Cir.  
3 1982).

4 The Court finds Movant's reading of *Bialac* too narrow. While a hearing for relief  
5 from stay may not be the proper time to adjudicate claims and counterclaims, this does not  
6 mean the Court must turn a blind eye to their existence. See *Collier on Bankruptcy*, ¶  
7 362.08[6] (15<sup>th</sup> ed. Rev. 2007) ("this does not mean that the existence of affirmative  
8 defenses and possible counterclaims cannot be raised and considered by the court in  
9 deciding whether to vacate the stay, but simply that a *res judicata* determination of the  
10 issues at that time would be inappropriate"); *In re Hubbel*, 427 B.R. 789, 796-97 (N.D. Ca.  
11 2010).

12 In *Hubbel*, the Northern California district court recently considered this issue when  
13 debtors asserted TILA claims against lenders seeking relief from stay, and the issue was  
14 raised as to whether or not the loans had been rescinded. Although finding that the claims  
15 should be adjudicated in a separate adversary proceeding, the court found that the  
16 bankruptcy judge did not abuse its discretion in considering those claims and denying the  
17 relief sought. The court upheld the bankruptcy court's conclusion that the claims cast  
18 serious doubt as to the moving parties' right to relief from stay.

19 The district court noted the legislative history of section 362, which states that  
20 although such claims should not be adjudicated in the stay motion, "[h]owever, this would  
21 not preclude the party seeking continuance of the stay from presenting evidence on the  
22 existence of claims which the court may consider in exercising its discretion." *Id.* at 796.

23 As in *Hubbel*, these claims may affect the amount of the debt, the value of the Property, the  
24 adequate protection necessary, or the prospect of reorganization. The Court will not close  
25 the door to evidence on the Movant's alleged failure to fund the pool construction, despite  
26 its narrow scope of relevance.

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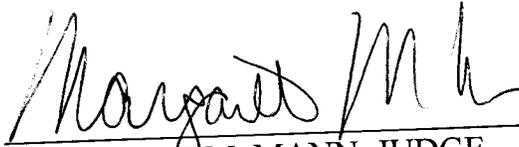
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This Court will therefore not adjudicate the cross-claims asserted by the Debtor in conjunction with this Motion. However, it will consider evidence of these claims on the narrow issues of this relief from stay proceeding: adequate protection, equity and necessity of the property for an effective reorganization. 11 U.S.C. §§362(d)(1) and (2).

The Court will discuss the evidence necessary to resolve the relief from stay issues at the status conference scheduled for August 13, 2010, and will also schedule as well the evidentiary hearing at that time. The Court also suggests the parties explore mediation as a way to resolve their differences.

DATED: August 11, 2010

  
MARGARET M. MANN, JUDGE  
United States Bankruptcy Court