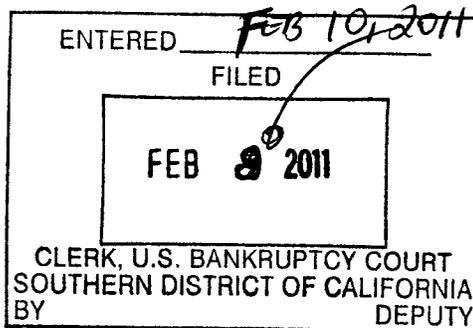


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WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BK CASE NO. 10-19328-LA-13
AMAL TADROS,)
Debtor,) CHAPTER: 13
MEMORANDUM DECISION RE MOTION
FOR RELIEF FROM AUTOMATIC STAY
GMAC MORTGAGE, LLC,)
Moving Party,) RS No. PD-1
v.) DATE: February 8, 2011
AMAL TADROS,) TIME: 10:00 a.m.
Respondent.) CRTRM: 1
JUDGE: Margaret M. Mann

1 Before the Court is the Motion for Relief from Stay filed by Movant GMAC Mortgage, LLC on
2 January 14, 2011 (the "Motion").¹ Movant seeks relief on the grounds that Movant's interest is not
3 adequately protected, or alternatively that the Debtor has no equity in the property and it is not
4 necessary for an effective reorganization. This matter came on for hearing on February 8, 2011 at
5 10:00 a.m. in Department 1.

6 The Court initially questioned whether Movant had standing to seek relief from the automatic
7 stay, because the record was devoid of any evidence that Movant had any interest in the note secured
8 by the deed of trust it sought to foreclose. However, on February 7, 2011, Movant filed the appropriate
9 endorsement authenticated through a declaration. While this evidence does not address all of the
10 potential issues regarding whether Movant has standing to foreclose on its collateral pursuant to
11 California Civil Code section 2932.5 or otherwise, Movant has presented a sufficient prima facie case
12 of its standing to be granted relief from the automatic stay.

13 **A. Background**

14 At the hearing on February 8, 2011, the Debtor's counsel argued that Movant should not be
15 granted relief from stay, despite a failure to make payments to Movant for over one year, since Movant
16 could not demonstrate it was entitled to enforce the loan at issue. Nevertheless, the Debtor has
17 scheduled the secured debt to Movant as undisputed, unliquidated and non-contingent. The Court
18 ordered that an adequate protection payment be made while it took the issue under submission. Upon
19 further consideration of the matter, the Court grants relief from stay to Movant, without prejudice to
20 the Debtor' rights, if any, to challenge Movant's standing in another context.

21 **B. Analysis**

22 Despite the potential presence of unresolved standing issues, the Court is persuaded to grant
23 relief from stay by the holding in *In re Aniel*, 427 B.R. 811, 817 (Bankr. ND CA 2010). In *Aniel*, as
24 here, the debtor had acknowledged the secured debt yet failed to provide adequate protection for many
25

26 ¹ The Court has subject matter jurisdiction of this proceeding pursuant to 28 U.S.C. § 1334 and
27 General Order No. 312-D of the United States District Court for the Southern District of California.
28 This is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

1 months. The secured creditor had presented its prima facie case that it was the holder of the note with
2 authority to foreclose despite further pending challenges by the debtor. *Id.* See e.g. Cal. Comm. Code
3 § 3301. A "holder" of a note is "the person in possession of a negotiable instrument that is payable
4 either to bearer or, to an identified person that is the person in possession." Cal. Comm. Code §
5 1201(b)(21)(A). When endorsed in blank, an instrument becomes payable to bearer and may be
6 negotiated by transfer of possession alone. Cal. Comm. Code § 3205.

7 Particularly because the debtor's challenges to the secured creditor's right to foreclose could be
8 pursued after relief from stay was granted, the court in *Aniel* granted relief from stay without prejudice
9 to the claims the debtor could bring in the proper proceedings. 427 B.R. 811, 815. Relief from stay
10 motions in the Ninth Circuit are not plenary proceedings where challenges to secured claims are
11 appropriately resolved. *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)
12 (overruled on other grounds by *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 127
13 S. Ct. 1199, 167 L. Ed. 2d 178 (2007)); "*The validity of the claim or contract underlying the claim is*
14 *not litigated* during the hearing." *Johnson*, 756 F.2d at 740 (emphasis added). See also *First Fed. Bank*
15 *of Cal. v. Robbins (In re Robbins)*, 310 B.R. 626, 631 (9th Cir. BAP 2004).

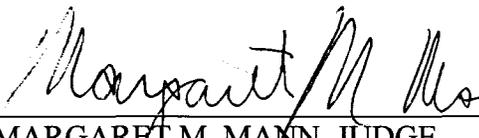
16 Because Movant has presented a colorable case that it has standing, and the Debtor has not
17 formally challenged the secured debt even in its schedules, the motion for relief from stay will be
18 granted without prejudice to the Debtor's rights to challenge the secured debt of Movant in another
19 context. *In re Palmdale Hills Property, LLC*, 423 B.R. 655, 668 (9th Cir. BAP 2009).

1 **C. Conclusion**

2 For the reasons set forth in this Memorandum Decision, the Court finds that GMAC Mortgage,
3 LLC is entitled to relief from stay for lack of adequate protection due to the failure of the Debtor to
4 make payments for over a year. However, this Memorandum Decision does not constitute findings of
5 fact or conclusions of law on any other issue. Counsel for Movant is directed to prepare an order in
6 accordance with this Memorandum Decision within ten (10) days of the date of entry.

7 IT IS SO ORDERED.

8
9 Dated: February 8, 2011


MARGARET M. MANN, JUDGE
United States Bankruptcy Court