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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-12-1502-KiPaTa
)		
ALFREDO PALACIOS,)	Bk. No.	12-31480-WB
)		
Debtor.)		
_____)		
)		
ALFREDO PALACIOS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
UPSIDE INVESTMENTS LP,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 22, 2013,
at Pasadena, California

Filed - April 15, 2013

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Julia W. Brand, Bankruptcy Judge, Presiding

Appearances: Andrew Edward Smyth, Esq. argued for appellant,
Alfredo Palacios; Daniel Singer, Esq. of the Law
Offices of Les Zieve argued for appellee, Upside
Investments LP.

Before: KIRSCHER, PAPPAS and TAYLOR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

1 Appellant, chapter 13² debtor Alfredo Palacios ("Palacios"),
2 appeals an order granting appellee, Upside Investments LP
3 ("Upside"), relief from the automatic stay to pursue its
4 foreclosure rights against property owned by Palacios. We AFFIRM
5 in part and REVERSE in part.³

6 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

7 Palacios (and his then-wife, Leandra) obtained a fee interest
8 in property located in South Gate, California ("Property") in
9 1994. On or about February 27, 2010, Palacios obtained a loan for
10 \$200,000 from Upside. In exchange for the loan, Palacios executed
11 a promissory note ("Note") and first deed of trust ("DOT") against
12 the Property in favor of Upside.⁴ According to the Note, Palacios
13 was to make interest only payments of \$2,000 per month for
14 23 months at 12% interest, to begin on March 1, 2010, with a
15 balloon payment of the remaining \$202,000 balance due, in full, on
16 March 1, 2012. Palacios agreed to pay interest on any unpaid
17 principal until the full amount of principal had been paid and to
18 make monthly payments until he had paid the entire principal,
19 interest and any other charges he might owe under the Note. If
20 Palacios failed to pay the full amount of each monthly payment

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22 ² Unless specified otherwise, all chapter, code and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

24 ³ In order to fully understand the facts underlying this
25 appeal, we have taken judicial notice of certain documents filed
26 with the bankruptcy court on its electronic docket. See O'Rourke
27 v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955,
957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mortg. Co.
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

28 ⁴ A second deed of trust in the amount of \$60,000 held by
Jose and Hilda Jimenez also exists on the Property.

1 due, the Note holder could demand immediate payment of all amounts
2 owed under the Note. Payments were to be made to The Argus Group
3 ("Argus"), servicer of the loan. Under the terms of the DOT,
4 Palacios was required to "provide, maintain and deliver" hazard
5 insurance on the Property with loss payable to Upside.

6 Palacios defaulted on the loan. Upside recorded a notice of
7 default on February 16, 2012. A foreclosure sale of the Property
8 was scheduled for June 21, 2012.

9 To stop the foreclosure, Palacios filed a chapter 13
10 bankruptcy case on June 20, 2012, thus imposing the automatic stay
11 under § 362(a). In his Schedule D, Palacios valued the Property,
12 which was his principal residence and place of business, at
13 \$321,000 and asserted that the value of Upside's secured claim was
14 \$216,965.46. It is undisputed that the debt to Upside had matured
15 by its own terms prior to the bankruptcy, and that Palacios did
16 not pay the final balloon payment as agreed.

17 In his proposed chapter 13 plan filed with his bankruptcy
18 petition, Palacios asserted that the prepetition arrears owed to
19 Upside on the loan were \$15,205.42, and he proposed to cure the
20 arrearages by paying Upside \$253.42 per month for sixty months at
21 0% interest. Except for the arrearages, Palacios's plan did not
22 provide for any other monthly mortgage payments to Upside.

23 Upside opposed confirmation of Palacios's proposed chapter 13
24 plan, contending that the actual prepetition arrears owed were
25 \$19,687.91 and, because the loan had fully matured, it should have
26 been classified as a Class 3 creditor, which required monthly

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1 payments of \$3,366.66 that Palacios was unable to fund.⁵

2 On July 28, 2012, Upside sought relief from stay under
3 § 362(d)(1), contending that its interest in the Property was not
4 adequately protected and that Palacios had not made postpetition
5 payments on the Note ("Stay Relief Motion"). In support, Upside
6 offered a declaration from Argus employee Jennifer Bercy
7 ("Bercy"). According to Bercy, the entire Note was due and
8 payable because it had matured on March 1, 2012. Upside's claim
9 as of July 9 was \$220,937.22, including the \$200,000 principal,
10 \$14,597.26 in accrued interest, and other late charges and costs.
11 Bercy asserted that Palacios's total postpetition delinquency on
12 the loan was \$5,740.63, and that an additional payment of
13 \$4,914.63 was due and payable on August 1, 2012. Bercy conceded
14 that Upside had received a \$2,000 payment from Palacios on
15 July 16, 2012. Finally, although Upside had not checked the box
16 on the stay relief form indicating that Palacios's failure to
17 provide proof of insurance on the Property was a basis for its
18 lack of adequate protection claim, Bercy had checked the box in
19 her declaration indicating that Upside had not been provided with
20 evidence that the Property was currently insured, as required
21 under the terms of the loan.

22 Palacios opposed the Stay Relief Motion, contending that
23 Upside's assertion that one postpetition payment of \$4,914.63 had
24 not been made was inconsistent with its assertion that the loan
25 had fully matured on March 1, 2012, which, in that case, argued

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27 ⁵ The chapter 13 trustee also opposed confirmation of
28 Palacios's proposed plan for nonfeasibility because it failed to
pay Upside its prepetition claim of \$19,687.

1 Palacios, no payments would be due and any amount due would be
2 classified as prepetition arrearages curable through the plan.

3 The bankruptcy court held a hearing on the Stay Relief Motion
4 on September 11, 2012. Palacios agreed that the Note had come due
5 on March 1, 2012, and he was willing to pay the full amount of the
6 Note over the term of the plan. Upside was willing to consider
7 Palacios's proposal, but argued that based on his scheduled
8 income, Palacios was clearly unable to make such payments. Upside
9 further argued that it had not been provided any proof of
10 insurance on the Property, and now taxes had come due that
11 remained unpaid. Other than counsel's argument, Upside offered no
12 evidence regarding the alleged unpaid taxes.

13 Palacios agreed with the bankruptcy court's suggestion that
14 Upside's loan would have to be paid off in five years should the
15 plan be confirmed. However, Palacios argued that this was a
16 confirmation issue, not a stay relief issue. As for proof of
17 insurance, Palacios's counsel said he was never informed that
18 insurance needed to be provided, but he could provide it in a
19 timely manner.

20 After considering the parties' arguments, the bankruptcy
21 court orally granted the Stay Relief Motion under § 362(d)(1) for
22 Palacios's "failure to make payments which would be required under
23 the plan" and "lack of insurance." Hr'g Tr. (Sept. 11, 2012)
24 4:6-7. The court granted further relief under § 362(d)(2), based
25 on its determination that the Property was not necessary to an
26 effective reorganization. Id. at 4:8-9.

27 The bankruptcy court entered an order granting the Stay
28 Relief Motion under § 362(d)(1) and (d)(2) on September 28, 2012

1 ("Stay Relief Order"). Palacios timely appealed.

2 On October 3, 2012, the motions panel entered an order
3 granting stay pending appeal on the condition that Palacios make
4 monthly payments to Upside of \$3,682.29, the amount that would be
5 paid under his chapter 13 plan. The stay would terminate upon the
6 earlier of either confirmation of a plan, or the dismissal or
7 conversion of Palacios's case to chapter 7.⁶

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
10 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.

11 **III. ISSUES**

12 1. Did the bankruptcy court abuse its discretion when it granted
13 the Stay Relief Motion under § 362(d)(1)?

14 2. Did the bankruptcy court abuse its discretion when it granted
15 the Stay Relief Motion under § 362(d)(2)?

16 **IV. STANDARD OF REVIEW**

17 We review an order granting relief from stay for abuse of
18 discretion. Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal),
19 450 B.R. 897, 914 (9th Cir. BAP 2011). A bankruptcy court abuses
20 its discretion if it applied the wrong legal standard or its
21 findings were illogical, implausible or without support in the
22 record. TrafficSchool.com, Inc. v. Edriver, Inc., 653 F.3d 820,
23 832 (9th Cir. 2011).

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27 ⁶ As of the date of this Memorandum, Palacios has been making
28 timely payments, no plan has been confirmed, and the case has not
been dismissed or converted to chapter 7. In fact, the case has
been idle since October 2012.

1 V. DISCUSSION

2 **A. The bankruptcy court did not abuse its discretion when it**
3 **granted the Stay Relief Motion under § 362(d)(1).**

4 Under § 362(d), a party in interest may request relief from
5 the automatic stay. Section 362(d)(1) authorizes relief from stay
6 "for cause, including the lack of adequate protection of an
7 interest in property of such party in interest." "Cause" has no
8 clear definition and is determined on a case-by-case basis.
9 Mac Donald v. Mac Donald (In re Mac Donald), 755 F.2d 715, 717
10 (9th Cir. 1985); Kronemyer v. Am. Contractors Indem. Co.
11 (In re Kronemyer), 405 B.R. 915, 921 (9th Cir. BAP 2009). The
12 party requesting relief from the automatic stay has the burden on
13 the issue of debtor's equity in property; the opposing party has
14 the burden on all other issues. In re Farmer, 257 B.R. 556, 559
15 (Bankr. D. Mont. 2000)(citation omitted); § 362(g). If the movant
16 establishes a prima facie case, the burden shifts to the debtor to
17 prove adequate protection. Section 362(g).

18 The bankruptcy court granted relief under § 362(d)(1) because
19 Palacios had failed to provide Upside with proof of current
20 insurance on the Property, and because he had failed to make
21 postpetition mortgage payments to Upside - payments the bankruptcy
22 court contended would have been required under his eventual
23 chapter 13 plan.

24 Palacios assigns several errors. He first contends he was
25 deprived of proper notice because the bankruptcy court granted
26 relief upon grounds which Upside's Stay Relief Motion failed to
27 assert. For example, Palacios contends the Stay Relief Motion
28 failed to assert that no proof of insurance had been provided to

1 Upside. We agree that while Upside did not check the box on the
2 first page of the stay relief motion form F 4001-1 indicating lack
3 of insurance as a basis for relief, Bercy's uncontroverted
4 testimony established that Upside had not been provided with proof
5 that the Property was currently insured, as required under the
6 terms of the DOT. Thus, Palacios was on notice about the
7 insurance issue prior to the stay relief hearing.

8 Palacios further argues that Upside's interest was adequately
9 protected due to the approximate \$100,000 equity cushion available
10 for its \$220,937.22 claim. Therefore, according to Palacios, the
11 bankruptcy court's decision to grant Upside relief on the basis of
12 lack of adequate protection was erroneous. Upside did not assert
13 as a basis for relief the lack of an equity cushion. Further,
14 nothing in the bankruptcy court's ruling indicates that it granted
15 relief for lack of adequate protection because no equity cushion
16 existed. Rather, one reason the bankruptcy court granted relief
17 was because Palacios did not meet his burden of proof that he
18 presently had insurance on the Property. A debtor's failure to
19 insure property can be a basis to grant a secured creditor relief
20 from stay under § 362(d)(1) for lack of adequate protection of its
21 collateral. See Delaney-Morin v. Day (In re Delaney-Morin),
22 304 B.R. 365, 370 n.3 (9th Cir. BAP 2003)(a secured creditor lacks
23 adequate protection if threatened with a decline in the property's
24 value, and a threat to decline includes failure to maintain
25 property insurance). Although Palacios offered to provide proof
26 of current insurance to Upside, nothing in the record indicates
27 that he ever did so.

28 Palacios also contends that the bankruptcy court erred when

1 it determined that relief was warranted under § 362(d)(1) due to
2 his failure to make postpetition payments on the Note. Palacios
3 argues that, because the loan had matured prepetition on March 1,
4 2012, no postpetition payments could have come due. He further
5 argues that any payments due should have been classified as
6 prepetition arrearages, which was an issue to be determined at
7 confirmation, not on a motion for relief from stay.

8 As a general rule, chapter 13 debtors may not modify the
9 rights of holders of claims secured solely by a security interest
10 in real property that is the debtor's principal residence.⁷
11 Section 1322(b)(2). However, § 1322(c)(2)⁸ carves out an
12 exception to the anti-modification rule against home mortgages,
13 allowing modification if the last payment on the original payment
14 schedule for the mortgage is due prior to the date on which the
15 final plan payment is due. Several courts have held that
16 § 1322(c)(2) applies to balloon mortgage payments that mature
17 prepetition, and that § 1322(c)(2) allows chapter 13 debtors to
18 cure such defaults by providing for full payment to the mortgagee

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21 ⁷ Palacios has not asserted that because he also uses the
22 Property as a place of business that the Property is not his
23 principal residence.

24 ⁸ Section 1322(c)(2) was adopted in 1994. It provides:

25 (c) Notwithstanding subsection (b)(2) and applicable
26 nonbankruptcy law –

27 (2) in a case in which the last payment on the original
28 payment schedule for a claim secured only by a security
interest in real property that is the debtor's principal
residence is due before the date on which the final payment
under the plan is due, the plan may provide for the payment
of the claim as modified pursuant to section 1325 (a)(5) of
this title.

1 over the life of the plan. In re Jones, 188 B.R. 281, 282 (Bankr.
2 D. Or. 1995)(concluding that § 1322(c)(2) overruled Seidel v.
3 Larson (In re Seidel), 752 F.2d 1382 (9th Cir. 1985), which held
4 that a debtor could not cure a prepetition fully matured mortgage
5 because such a cure would be a modification prohibited by
6 § 1322(b)(2)); In re Lobue, 189 B.R. 216, 218 (Bankr. S.D. Fla.
7 1995)(recognizing the overruling of In re Seidel); In re Chang,
8 185 B.R. 50, 53 (Bankr. N.D. Ill. 1995)(recognizing the overruling
9 of In re Seidel); In re Escue, 184 B.R. 287, 293 (Bankr. M.D.
10 Tenn. 1995). See also In re Yett, 306 B.R. 287, 292 (9th Cir. BAP
11 2004)(questioning the viability of In re Seidel following the 1994
12 addition of § 1322(c)(2)).

13 Any doubts of a chapter 13 debtor's ability to cure mortgage
14 defaults such as Palacios's under the plan is further eliminated
15 by § 1322(c)(1), which provides that, notwithstanding § 1322(b)(2)
16 and applicable nonbankruptcy law, a default with respect to, or
17 that gave rise to, a lien on the debtor's principal residence may
18 be cured under § 1322(b)(3) or (5), until the residence is sold at
19 a foreclosure sale. See 8 COLLIER ON BANKRUPTCY ¶ 1322.07[2] (Alan N.
20 Resnick & Henry J. Sommer, eds., 16th ed. 2012)(also recognizing
21 the language of § 1322(c)(1) has overruled In re Seidel).

22 Palacios conceded at the stay relief hearing that in any
23 proposed chapter 13 plan he would have to pay Upside the full
24 amount of the Note over the term of the plan. We agree. However,
25 we cannot agree with Palacios's argument that considering the
26 matter of plan payments at this point was premature. Palacios's
27 chapter 13 plan, filed with his bankruptcy petition nearly three
28 months prior to the stay relief hearing, proposed to cure only the

1 prepetition arrearages on the Note, with monthly payments of
2 \$253.42 for sixty months. The plan proposed no monthly mortgage
3 payments for the remaining balloon amount due and owing. As a
4 result, the plan was unconfirmable on its face. Further, at the
5 time of the stay relief hearing, Palacios's Schedules I and J
6 reflected that he would be unable to pay any amount closely
7 approximating the \$3,682.29 monthly payment required to pay Upside
8 in full. Although Palacios claimed at oral argument that his
9 financial situation has improved due to securing a tenant, he has
10 yet to file amended Schedules I and J to reflect this. Finally,
11 leaving aside the proposed plan, Palacios was required under the
12 Note to make monthly interest payments to Upside on any unpaid
13 principal until it had been paid in full. The record established
14 that he made only one of those \$2,000 payments by the time of the
15 hearing.

16 We are unable to say that the bankruptcy court abused its
17 discretion by considering this evidence in determining that
18 termination of the stay was warranted for "cause." See
19 In re Redden, 2011 WL 2292312, at *10 (Bankr. S.D. Tex. June 7,
20 2011) (considering proposed plan and granting relief from stay
21 where debtor would be unable to make the necessary payments to
22 movant in full during the life of the plan); In re Moreland,
23 124 B.R. 921, 923 (Bankr. D. Conn. 1991)(considering proposed plan
24 and denying relief from stay where chapter 13 debtor had proposed
25 good faith plan payments to pay matured prepetition mortgage in
26 full). Even if considering this evidence was somehow an abuse of
27 the bankruptcy court's discretion, it was certainly within its
28 right to terminate the stay due to Palacios's failure to provide

1 proof of current insurance on the Property. Accordingly, the
2 bankruptcy court did not abuse its discretion when it granted
3 Upside relief from stay under § 362(d)(1) for "cause."

4 **B. The bankruptcy court abused its discretion when it granted**
5 **the Stay Relief Motion under § 362(d)(2).**

6 Section 362(d)(2) authorizes relief from stay when the debtor
7 has no equity in the property and the property is not necessary to
8 an effective reorganization. Section 362(d)(2)(A) and (B). Both
9 elements of the test must be met. See 3 COLLIER ON BANKRUPTCY at
10 ¶ 362.07[4]. Equity is "the amount or value of a property above
11 the total liens or charges." Stewart v. Gurley, 745 F.2d 1194,
12 1196 (9th Cir. 1984)(citations omitted).

13 The bankruptcy court granted relief under § 362(d)(2) because
14 it determined that the Property was not necessary to an effective
15 reorganization. Palacios assigns several errors here, including
16 that the court erred because the elements of § 362(d)(2) were not
17 met as Palacios has at least \$40,000 equity in the Property.

18 We agree that Palacios has equity in the Property. We
19 further note that Upside did not request any relief under
20 § 362(d)(2), and it did not provide any evidence in support of
21 such relief. It is also uncontroverted that the Property serves
22 not only as Palacios's principal residence, but also as his place
23 of business. Therefore, presumably, it may be necessary to an
24 effective reorganization.

25 Moreover, the bankruptcy court made no detailed findings of
26 fact and conclusions of law as to why relief was proper under
27 § 362(d)(2), which, since this was a contested matter under
28 Rule 9014, it was required to do under Rule 7052. See

1 Rule 9014(c) incorporating Rule 7052; In re Veal, 450 B.R. at 919
2 (bankruptcy court must make findings of fact, either orally on the
3 record or in a written decision, in contested matters, and the
4 findings must be sufficient to enable a reviewing court to
5 determine the factual basis for the court's ruling).

6 Accordingly, the bankruptcy court did abuse its discretion
7 when it granted Upside relief from stay under § 362(d)(2).

8 **VI. CONCLUSION**

9 The bankruptcy court did not abuse its discretion when it
10 granted Upside relief under § 362(d)(1), and we AFFIRM that
11 portion of the Stay Relief Order. However, we REVERSE the portion
12 of the Stay Relief Order granting relief under § 362(d)(2),
13 because the record reflects that Palacios has equity in the
14 Property, and because the bankruptcy court did not articulate any
15 findings on the record to support its decision to grant such
16 relief.

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