

I. Background

In 1990 Rodriguez, together with his mother's husband, Jose Quintana ("Quintana"), purchased approximately 60 acres of land in two 30 acre tracts in Johnson County, Texas. At the time of the purchase, Rodriguez and Quintana executed a note and two deeds of trust, one on each tract of land (the "Note" and the "Deeds of Trust"). Through a series of transactions, Cadle became the owner and holder of the Note and Deeds of Trust.

By court decree, upon their divorce, title to the two tracts passed from Quintana to his wife, Rodriguez's mother. On July 23, 2001, his mother conveyed her interest in the property to Rodriguez. The Deeds of Trust (General Provisions, ¶ 14) provide the subject property cannot be conveyed without the beneficiary's (Cadle's) consent. No consent was obtained for the transfer from his mother to Rodriguez (or for the passage of title to her at the time of her divorce).

On March 1, 2002, Rodriguez filed for relief under chapter 13 of the Bankruptcy Code.⁴ At the time of his filing, Rodriguez was in default of his obligations under the Note, and Cadle had accelerated the Note. In the Motion Cadle states that the amount due to it at filing was \$74,498.80, including arrearages.

In his schedules, Debtor designated the two 30 acre tracts subject to the Deeds of Trust as his exempt homestead. Cadle then timely filed an objection to the homestead exemption⁵ (Fed. R. Bankr. P. 4003(b)), arguing that (1) the description of the exemption

⁴ 11 U.S.C. 101 *et seq.*, hereinafter the "Bankruptcy Code."

⁵ The court questioned Cadle's economic interest in whether the property was exempt and, hence, its standing to raise the issue. *Rodriguez*, 282 B.R. at 197. This is of some relevance to the concerns of the court expressed below, section II.D.

in Debtor's schedules was faulty; (2) because of General Provisions, ¶ 14 of the Deeds of Trust, the conveyance of Quintana's ownership interest through his mother to Rodriguez violated Cadle's rights and invalidated Debtor's homestead election; and (3) the two tracts could not be designated as a rural homestead under Texas law. The court overruled the objection, holding (1) there was no material flaw in the property description in Debtor's schedules; (2) the conveyance placing title to the property in Debtor did not invalidate the homestead designation and, further, did not violate General Provisions, ¶ 14 of the Deeds of Trust⁶; and (3) the property could properly be designated as a rural homestead under Texas law.⁷ Regarding the third issue, Cadle relied on a statute abrogated by the Texas legislature in 1999, maintaining this position even after Debtor pointed out the change in the law.

In the Motion Cadle asks for relief from the stay for cause,⁸ including a lack of adequate protection. With regard to the lack of adequate protection, Cadle asserts Debtor has not maintained insurance on improvements subject to its lien, and missed his September, 2002 payment (but alleges no other missed payments since his chapter 13

⁶ The specific holding was:

“[T]his Court finds and concludes that the conveyance . . . to the Debtor merely effected a transfer of an interest in the Property to a Grantor (as that term is defined in the Deeds of Trust) from a non-Grantor A transfer that returned a previously alienated interest in the property to a Grantor could not be a violation of [¶ 14].”

Rodriguez, 282 B.R. at 198.

⁷ The discussion of the three issues is found in *Rodriguez*, 282 B.R. at 197-200.

⁸ There appears to be no argument that there is substantial equity in the two tracts beyond the debt to Cadle. Thus, only Bankruptcy Code section 362(d)(1) need be addressed by the court. Section 362(d)(1) provides that “the court shall grant relief from the stay . . . (1) for cause, including the lack of adequate protection”

filing). Cadle also argues the stay should be lifted on the basis of General Provisions, ¶ 14 of the Deeds of Trust and the 2001 transfer of title to Debtor, even though this issue was dispositively determined in the court's ruling on exemptions – a ruling that is now final and unappealable. Finally, Cadle asks that it be granted attorneys' fees in connection with the Motion.

Debtor argues (and testified) that he has made every payment due under the Note except that for September, 2002. *See, also*, Debtor's Exhibit 1. Debtor testified that he missed the September payment through oversight and is able and prepared to cure the deficiency. Debtor also testified that he had no notice of the missed payment until receiving a letter from his counsel after the Motion was filed. Though counsel for the parties bickered before the court (until told to stop) over whether Cadle's attorney told Debtor's attorney of the missed payment in January, 2003, neither attorney testified, and the court must rely on the evidence⁹ before it. The court thus finds that Debtor had only that notice he testified to. Debtor finally urges he is not required to maintain insurance on the property as the two tracts were raw land when he acquired them and executed the Deeds of Trust.

⁹ The Marcu affidavit and the Motion recite notice to Debtor, but ambiguously. The only writing referred to (Exhibit 13 to Marcu's affidavit, cited in ¶ 12 of the Motion) follows the sentence, "Although notified of this deficiency, Debtor has chosen to remain in default on his periodic payment." Exhibit 13 to the Marcu affidavit, however, is Debtor's chapter 13 plan summary. The certificate of conference appended to the Motion is also at least phrased with calculation if it is not ambiguous. It is unclear whether the local rule requiring counsel to conduct a conference has been complied with. L.B.R. 9014.1(c).

II. Discussion

A. Title Transfer

The court disposed of this issue previously. Cadle did not appeal the court's holding that the transfers of the Quintana interest to Rodriguez did not violate General Provisions, ¶ 14 of the Deeds of Trust. The question is therefore *res judicata*, and it was improper of Cadle to raise the issue again. Cadle and its counsel are reprimanded for doing so.

B. The Missed Payment

The Note held by Cadle (Exhibit 1 to the Marcu affidavit) provides for notice by payee to maker of any default “in the payment of this note”¹⁰ Though the Note does not specify how notice must be given, the addresses of the makers are provided on the face of the Note, while no other contact information is given. This suggests that notice in writing was contemplated by the parties. In any event, as the court finds no notice was received by Debtor until after the filing of the Motion, and Cadle provided no evidence Debtor was given notice, the court must hold that the Motion was filed without first giving to Debtor the notice provided in the Note. On the other hand, since the notice required in the Note is a prerequisite only to its acceleration, and the Note was accelerated prior to Debtor's chapter 13 filing, the court cannot conclude that Cadle acted improperly in filing the Motion. Thus the court must address whether, under the facts and circumstances of this case, Cadle has shown cause for relief from the stay.

Cadle has cited the court to *In re Taylor*, 151 B.R. 646 (E.D.N.Y. 1993) and *In re Davis*, 64 B.R. 358 (Bankr. S.D.N.Y. 1986) for the proposition that cause exists for relief

¹⁰ See, similarly, the Deeds of Trust, Beneficiary's Rights, ¶ 5.

from the automatic stay of section 362 of the Bankruptcy Code based on Debtor's failure to make the September payment. Despite the equity in its collateral, Cadle contends the failure to make the September payment amounts to a failure of adequate protection.¹¹

Neither *Taylor* nor *Davis* supports Cadle's position. In *Taylor*, the debtor made no monthly payments between confirmation of his plan on June 20, 1991 and November 25, 1991 (151 B.R. at 647). In *Davis*, the debtor fell behind five or more payments post-confirmation before relief from the stay was granted (64 B.R. at 358). The significance of missing multiple payments (as opposed to a single payment) in deciding whether relief from the stay should be granted is reflected in the progeny of *Taylor* and *Davis*. See, e.g., *In re Elmira Litho, Inc.*, 174 B.R. 892, 903 (Bankr. S.D.N.Y. 1994); *In re Smith*, 104 B.R. 695, 700 (Bankr. E.D. Pa. 1989). In any case, whether cause exists for relief from the stay is a question which requires the court to assess the facts and equities of each case. See, e.g., *In re Tudor Motor Lodge Assoc., Ltd. Partnership*, 102 B.R. 936, 954 (Bankr. D.N.J. 1989).

In light of (1) the failure to give notice to Debtor that the September payment was missed; (2) Debtor's willingness and ability to make good the missing payment; (3) Debtor's otherwise consistent payment record; and (4) Debtor's substantial equity in Cadle's collateral, the court finds Cadle is adequately protected.

C. Insurance

Though Rodriguez acquired the two 30 acre tracts as raw land, they now have improvements on them. The Deeds of Trust, Grantor's Obligations, ¶ 4, require

¹¹ Cadle argues it ought not to have to come to court to collect payments not made timely. As the court finds Cadle gave Debtor no notice of the missed September payment, there is no basis for concluding such action will be required of Cadle in the future.

insurance on improvements. Despite being substantially overcollateralized, Cadle is entitled to have the improvements to its collateral insured, and the Debtor therefore must obtain insurance as required in the documents.

D. Cadle’s Attorneys’ Fees

Thus far in this case Cadle has (1) pursued an objection to Debtor’s exemptions based on a repealed statute; (2) attempted in the Motion to relitigate an issue already finally disposed of; (3) pursued a motion for relief from stay following little or no notice to Debtor or his counsel which Motion Cadle should have expected would be denied; and (4) requested expedited relief based on a six month-old “emergency.” The court has previously noted that Cadle, its affiliates and its counsel seem to perceive the bankruptcy court as an arena made to order to establish a reputation for intimidating debtors.¹²

While a creditor is certainly entitled to invoke remedies the law provides to it, good faith is required of creditors in pursuing remedies just as it is of debtors. A debtor guilty of serial bankruptcy filings may be penalized (*See, e.g., In re Smith*, 286 F. 3d 461, 466 (7th Cir. 2002) (Serial bankruptcy filings may indicate bad faith); *In re Casse*, 198 F. 3d 327, 332 (2d Cir. 1999) (Serial filers are “among the Hannibal Lecters of current bankruptcy litigation”); *In re Thomas*, 123 B.R. 552, 534 (Bankr. W.D. Tex. 1991).

The effect of serial filings is harm to creditors. The same result comes from abuse by a secured creditor of the tools afforded it for its protection in a consumer case. Here, Debtor’s original chapter 13 plan (Exhibit 13 to the Marcu affidavit) anticipated payment

¹² The Cadle Company v. Mitchell, Adv. No. 02-04199 (Bankr. N.D. Tex. 2003), Slip Op., pp. 15-16. The cumulative effect from case to case of the conduct of Cadle and its counsel could eventually result in an erosion of such confidence as the court may have in the competence and professionalism of that counsel.

of 100% of Debtor's unsecured debt. The Amended Final Plan now on file projects a 73% recovery. It is quite possible that the reduced return to unsecured creditors is a consequence of Debtor's need to defend against Cadle's near-frivolous objection to exemptions. A further reduction in return to unsecured creditors may result from litigation of the Motion.

Moreover, Congress did not intend remedies such as a creditor's right to object to exemptions or to seek relief from automatic stay to be used as weapons.¹³ Rather, these rights are afforded creditors for their protection and to prevent abuse of the system by a debtor. No such abuse by Rodriguez has occurred in this case, and at no time has Cadle been in danger of recovering less than the full amount of its debt.

Because Cadle's actions have manifestly harmed other creditors and appear to have been motivated other than by Cadle's need to protect itself, the court initially considered invoking Fed. R. Bankr. P. 9011(c)(1)(B) in this matter. The court will not, however, pursue whether sanctions should be imposed on Cadle and its counsel on this occasion. This does not mean the court will not consider sanctions for similar conduct in the future. On the other hand, Cadle surely has not shown itself entitled to reimbursement of costs and fees incurred in connection with the Motion. Indeed, even if the Motion were better grounded, the failure to give notice to Debtor before its filing would warrant denial of costs and fees. As it is, any award of fees to Cadle for bringing and pursuing the Motion would be unreasonable.

¹³ See *In re Garcia*, 260 B.R. 622 (Bankr. D. Conn. 2001) (Ordering creditor's counsel to show cause why sanctions should not be imposed under Rule 9011 in connection with an objection to discharge).

III. Order

For the foregoing reasons, Debtor shall bring his payments to Cadle current through May, 2003, by May 15, 2003. Debtor further shall obtain insurance in compliance with Grantor's Obligations, ¶ 4 of the Deeds of Trust by July 1, 2003. Should Debtor fail to do so, Cadle may renew its Motion. Otherwise, the Motion is in all respects DENIED, with prejudice to Cadle seeking relief from the stay in this case in the future unless (1) Debtor has post petition defaulted in payment to Cadle or otherwise defaulted under the Note or Deeds of Trust; (2) Cadle has provided mailed written notice of the default to Debtor and Debtor's counsel; and (3) Debtor has not cured such default within 15 days of the date of mailing of such notice.

It is so ORDERED.

Signed this the _____ day of April 2003.

DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE