



**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**LOS ANGELES DIVISION**

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5	In re:	)	Case No. 2:10-bk-55570-PC
6	OMAR YEHIA SPAHI,	)	Adversary No. 2:11-ap-01124-PC
7		)	Chapter 11
8	Debtor.	)	
9	OMAR YEHIA SPAHI,	)	<b>MEMORANDUM DECISION</b>
10	Plaintiff,	)	
11	v.	)	
12	NCB, FSB,	)	
13	Defendant.	)	
14		)	

15 Plaintiff, Omar Yehia Spahi (“Spahi”) has filed an Emergency Motion for Preliminary  
 16 Injunction and Temporary Restraining Order Pursuant to 11 U.S.C. § 105(a) and FRBP 7065,  
 17 and/or for an Extension of the Automatic Stay (“Motion”). Spahi seeks a hearing on the  
 18 Motion on shortened notice. By written opposition, Defendant, NCB, FSB (“FCB”) opposes  
 19 both an expedited hearing on the Motion and the relief sought in the Motion. Having considered  
 20 Spahi’s Motion and supporting declaration in light of NCB’s response, the court denies the relief  
 21 requested in the Motion and abstains from exercising jurisdiction over this adversary proceeding  
 22 based upon the following findings of fact and conclusions of law<sup>1</sup> made pursuant to F.R.Civ.P.  
 23 52(a)(1), as incorporated into FRBP 7052 and made applicable to contested matters by FRBP  
 24 9014(c).

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 27 <sup>1</sup> To the extent that any finding of fact is construed to be a conclusion of law, it is hereby  
 adopted as such. To the extent that any conclusion of law is construed to be a finding of fact, it  
 is hereby adopted as such.

1 I. STATEMENT OF FACTS

2 Spahi filed a voluntary petition under chapter 11 in Case No. 2:09-bk-44294-SB on  
3 December 4, 2009. On September 16, 2010, NCB filed a motion seeking relief from the  
4 automatic stay to exercise its rights with respect to Units # 504-B, 1809-P, 1705-P, 609-P, 508-  
5 B, 801-P, and 904-P, 201 Ocean Avenue, Santa Monica, California. Spahi opposed each of the  
6 motions.<sup>2</sup> At a hearing on October 6, 2010, the court granted NCB's motion and lifted the stay  
7 as to each of the units identified in the motion in conjunction with dismissal of the case.

8 On October 22, 2010, Spahi filed his second voluntary chapter 11 petition – 15 days after  
9 entry of the order dismissing his previous case. On November 8, 2010, Spahi filed a motion  
10 seeking a continuation of the automatic stay under 11 U.S.C. § 362(c)(3) as to all creditors,  
11 including NCB and its efforts to exercise its contractual and statutory rights with respect to Units  
12 # 801P, 609P, and 504B (the “Critical NCB Units”). On November 21, 2010, the court denied  
13 Spahi's motion based on findings of fact and conclusions of law set forth in its Memorandum  
14 Decision. The Order Denying Motion for Order Imposing a Stay or Continuing the Automatic  
15 Stay, together with the Memorandum Decision of even date therewith, were entered on  
16 November 22, 2010. On December 6, 2010, Spahi filed a Motion for Reconsideration of Order  
17 Denying Debtor's Request to Extend the Automatic Stay and sought a hearing on the motion on  
18 shortened notice. NCB opposed the motion. After a hearing on regular notice, the court denied  
19 Spahi's motion for reconsideration on January 6, 2011. An Order Denying Motion for  
20 Reconsideration of Order Denying Debtor's Request to Extend Automatic Stay was entered on  
21 January 10, 2011.

22 By his motion filed on January 18, 2011, Spahi seeks “issuance of an emergency  
23 temporary restraining order or the imposition of the automatic stay pursuant to Bankruptcy Code  
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25 <sup>2</sup> Spahi is not the individual to whom the loans were made by NCB. Spahi received his interest  
26 in each of the properties that are the subject of NCB's liens, whether fractional or otherwise, in  
27 contemplation of bankruptcy.

1 Sections 362(a) and 105, pending consideration of the Complaint for (1) Disallowance of Claims  
2 and Liens under 11 U.S.C. § 502(d); (2) Validity, Priority or Extent of Lien; [and] (3) Injunctive  
3 Relief Under 11 U.S.C. §§ 105(a) and 363(a) filed on 1/14/11.” Motion, 1:9-14. According to  
4 the motion, Unit 801P is set for a foreclosure sale on January 24, 2011, but no sale has been set  
5 with respect to Unit 609P or 504B. Spahi requests a temporary restraining order (“TRO”) “that  
6 will (i) immediately reinstate the automatic stay until [Spahi] has had an opportunity to seek  
7 confirmation of his chapter 11 plan or (ii) in the alternative, restrain [NCB] from any and all  
8 foreclosure actions against the Critical NCB Units until the court can consider [Spahi’s]  
9 Complaint.” Motion, 4:23-26.

## 10 II. DISCUSSION

11 The court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(b) and  
12 1334(b). Spahi’s motion is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G) and (O).  
13 Venue is appropriate in this court. 28 U.S.C. § 1409(a).

14 To the extent that Spahi’s Motion seeks a reinstatement of the automatic stay, the Ninth  
15 Circuit has stated that “[b]ecause the stay under § 362 is ‘automatic’ and ‘self-executing’ only  
16 upon the filing of a bankruptcy petition, no authority exists for ‘reinstating’ an automatic stay  
17 that has been lifted” by the court. Canter v. Canter (In re Canter), 299 F.3d 1150, 1155 n.5 (9<sup>th</sup>  
18 Cir. 2002).

19 To the extent that Spahi’s Motion seeks issuance of a TRO, it is procedurally defective<sup>3</sup>  
20 and states the wrong standard for the issuance of a preliminary injunction. Rule 65(a)(1) permits  
21 the court to issue a preliminary injunction on notice to the adverse party. F.R.Civ.P. 65(a)(1).  
22 “A preliminary injunction is an extraordinary remedy never awarded as of right.” Winter v.  
23 Natural Res. Def. Council, Inc., \_\_\_ U.S. \_\_\_, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008); see  
24 Munaf v. Geren, 553 U.S. \_\_\_, 128 S.Ct. 2207, 2218-2219, 171 L.Ed.2d 1 (2008) (“A

25 \_\_\_\_\_  
26 <sup>3</sup> LBR 7065-1(b)(2) states: “When a TRO is requested, a preliminary injunction must be sought  
27 by order to show cause.” Spahi seeks issuance of a TRO on motion set on shortened notice.

1 preliminary injunction is an extraordinary and drastic remedy.”). To obtain a preliminary  
2 injunction, the moving party must “establish that he is likely to succeed on the merits, that he is  
3 likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities  
4 tips in his favor, and that an injunction is in the public interest.”<sup>4</sup> Winter, 129 S.Ct. at 374; see  
5 Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009). “In each case, courts ‘must  
6 balance the competing claims of injury and must consider the effect on each party of the granting  
7 or withholding of the requested relief.’” Winter, 129 S.Ct. at 376 (quoting Amoco Prod. Co. v.  
8 Gambell, 480 U.S. 531, 542 (1987)). A temporary restraining order should not issue absent a  
9 showing that it is necessary to preserve the status quo and prevent irreparable harm pending a  
10 hearing on a preliminary injunction. See Granny Goose Foods, Inc. v. Brotherhood of Teamsters  
11 & Auto Truck Drivers Local No. 70, 415 U.S. 423, 440 (1974).

12 Spahi’s evidence of “likelihood of success on the merits” and likelihood of irreparable  
13 harm” hinges on Spahi’s own declaration which is based, in pertinent part, on information and  
14 belief. Even if the court were to accept the statements in the declaration as true for purposes of  
15 the Motion, “[e]conomic injury alone does not support a finding of irreparable harm because  
16 such injury can be remedied by a damage award.” Irwin, 338 B.R. at 854 (citing Rent-A-Center,  
17 Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9<sup>th</sup> Cir. 1991). “Mere  
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20 <sup>4</sup> Prior to Winter, the Ninth Circuit recognized two differing standards for the issuance of a  
21 preliminary injunction. The traditional test required the plaintiff to establish “(1) a strong  
22 likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if  
23 preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)  
24 advancement of the public interest (in certain cases).” Taylor v. Wesly, 488 F.3d 1197, 1200  
25 (9th Cir. 2007). The “alternative test” required that “plaintiff demonstrate either a combination  
26 of a probable success on the merits and the possibility of irreparable injury or that serious  
27 questions are raised and the balance of hardships tips sharply in his favor.” Id. “These two  
formulations represent[ed] two points on a sliding scale in which the required degree of  
irreparable harm increase[d] as the probability of success decrease[d]. They [were] not separate  
tests but rather outer reaches of a single continuum.” Id. The Ninth Circuit has clarified “[t]o  
the extent that our cases have suggested a lesser standard, they are no longer controlling, or even  
viable.” Am. Trucking Ass’ns, Inc. v. City of L.A., 559 F.3d 1046, 1052 (9th Cir. 2009).

1 financial injury, . . . , will not constitute irreparable harm if adequate compensatory relief will be  
2 available in the course of litigation.” Goldie’s Bookstore, Inc. v. Superior Court of State of Cal.,  
3 739 F.2d 466, 471 (9<sup>th</sup> Cir. 1984) (affirming trial court’s decision not to enjoin the loss of a  
4 commercial leasehold). Spahi states in his declaration that “the NCB are necessary for an  
5 effective reorganization under the terms of the Plan,” but there is nothing in the declaration that  
6 establishes that each of the Critical NCB Units are essential to the success of such plan and that  
7 the plan will be confirmed within a reasonable period of time. Spahi’s Motion fails to address  
8 the remaining two elements of Winter.

9 Finally, and most importantly, Spahi’s complaint re-urges the issue of “validation” that  
10 was first argued by Spahi in connection with his motion to continue the automatic stay. In  
11 denying such motion, the court in its Memorandum Decision entered on November 22, 2010,  
12 stated:

13 With respect to the issue of validation, the court notes that Spahi did not raise this issue  
14 at the hearing on NCB’s motion for relief from the stay on October 7, 2010. Since  
15 dismissal of his first case, Spahi has filed suit against NCB in Case No. BC448630,  
16 styled Spahi v. NCB, a Federal Savings Bank, in the Superior Court of California,  
17 County of Los Angeles, seeking a declaratory judgment and damages for alleged  
18 wrongful foreclosure, violation of statutory duties, and unjust enrichment. Spahi is free  
19 to raise the issue of whether NCB has standing to enforce the note and deed of trust in  
20 state court in the event further action is taken to foreclose on these units. These issues  
21 arise under state law, were the subject of a pending state court action when Spahi filed  
22 his petition in this case, and can be properly and timely adjudicated in state court.

23 Memorandum Decision, 8:3-11. Because the state court action remains pending between Spahi  
24 and NCB and the complaint made the basis of this adversary proceeding alleges causes of action  
25 between Spahi and NCB that arise under non-bankruptcy law which can be timely adjudicated in  
26 the non-bankruptcy forum, the court will abstain exercising jurisdiction over this adversary  
27 proceeding pursuant to 28 U.S.C. § 1334(c)(1).



In re:	CHAPTER:
Debtor(s).	CASE NUMBER:

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Notice is given by the court that a judgment or order entitled (*specify*) MEMORANDUM DECISION was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

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- Michael Jay Berger michael.berger@bankruptcypower.com, cristina.frankian@bankruptcypower.com
- Leslie A Cohen leslie@leslicohenlaw.com, jaime@leslicohenlaw.com
- Christine M Pajak cpajak@stutman.com
- United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov

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**II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

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