



NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:)	Case No. 2:12-bk-14292-PC
)	
GOLDENPARK, LLC,)	Adversary No. 2:12-ap-01887-PC
)	
)	Chapter 11
Debtor.)	
)	
KAY NAM KIM,)	MEMORANDUM DECISION
)	
Plaintiff,)	
)	
v.)	
)	
URBAN COMMONS SYCAMORE,)	
LLC, <u>et al.</u> ,)	
)	
Defendants.)	
)	

Plaintiff, Kay Nam Kim (“Kim”) seeks an order shortening the time for a hearing on Plaintiff’s Application for a Temporary Restraining Order and Preliminary Injunction or in the Alternative, a Stay under 11 U.S.C. § 105(a) (“Application”). Having considered Kim’s

1 Application and having determined that the matter can be resolved pursuant to F.R.Civ.P. 65(b),¹
2 as incorporated into FRBP 7065, without a hearing, the court dispenses with oral argument and
3 denies the relief requested in the Application with respect to issuance of a temporary restraining
4 order (“TRO”) based upon the following findings of fact and conclusions of law² made pursuant
5 to F.R.Civ.P. 52(a)(1), as incorporated into FRBP 7052 and made applicable to contested matters
6 by FRBP 9014 (c).

7 I. STATEMENT OF FACTS

8 On July 6, 2012, Kim filed a Verified Complaint: (1) for Judicial Declaration, and (2) to
9 Enjoin Foreclosure Sale (“Complaint”) in the above referenced adversary proceeding. In his
10 Complaint, Kim alleges that he holds a third lien on certain real property owned by Goldenpark,
11 LLC (“Goldenpark”) located at 13111 Sycamore Drive, Norwalk, California (the “Property”);
12 that Urban Commons Sycamore, LLC (“Urban Commons”), the holder of the first and second
13 liens on the Property, seeks to foreclose its liens on the Property at a trustee’s sale to be
14 conducted on or about July 13, 2012; and that Urban Commons’ Notice of Default (“NOD”) and
15 Notice of Sale (“NOD”) are allegedly “void because Goldenpark has tendered payments to Urban
16 Commons from July 2011 through July 2012 in the approximate amount of \$1,320,000 thereby
17 rendering at least a partial cure of the default in the NOD pursuant to California Civil Code
18 Sections 2924 et seq.”³

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20 ¹ Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the
21 Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse
22 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). “Rule”
23 references are to the Federal Rules of Bankruptcy Procedure (“FRBP”), which make applicable
certain Federal Rules of Civil Procedure (“F.R.Civ.P.”). “LBR” references are to the Local
Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California.

24 ² To the extent that any finding of fact is construed to be a conclusion of law, it is hereby
25 adopted as such. To the extent that any conclusion of law is construed to be a finding of fact, it
26 is hereby adopted as such.

27 ³ Complaint, 6:20-23.

1 Kim “seeks a declaratory judgment declaring the rights and other legal relations of the
2 parties in respect of any foreclosure sale and with respect to plaintiff’s lien.”⁴ According to Kim,
3 “[a]n actual controversy exists between plaintiff and defendants, and plaintiff should have a
4 judicial determination and declaration of plaintiff and defendants’ respective rights and duties,
5 which is appropriate at this time so that plaintiff may determine his rights and duties before any
6 foreclosure sale should proceed.”⁵ Kim further asserts that it, as a junior lienholder on
7 Goldenpark’s Property, has prepared and filed a disclosure statement and proposed plan of
8 reorganization for Goldenpark’s only significant asset, that a hearing on the disclosure statement
9 is set for August 8, 2012, and that it and Goldenpark will suffer irreparable harm in the absence
10 of an injunction “because a non-judicial sale of the Property will destroy or substantially and
11 disproportionately diminish [Goldenpark’s] prospects for the formulation and the successful
12 confirmation of [Goldenpark’s] Chapter 11 Plan and will interfere with or destroy property of
13 [Goldenpark’s] Chapter 11 estate.”⁶ Goldenpark, the debtor in possession and owner of the
14 Property, is not a party to this adversary proceeding.

15 By his Application, Kim requests issuance of a “TRO and then a Preliminary Injunction
16 or, in the Alternative, a Stay under 11 U.S.C. § 105(a),”⁷ to prevent a foreclosure sale on the
17 Property “until the controversy can be disposed of on the merits of the case, and following
18 approval of the disclosure statement and confirmation of a Plan of reorganization, that were filed
19 with the Court on June 26, 2012.”⁸

22 ⁴ Id. 7:13-14.

23 ⁵ Id. 7:9-12.

24 ⁶ Id. 10:2-5.

25 ⁷ Application, 16:22-23.

26 ⁸ Id. 16:19-21.

II. DISCUSSION

A. Temporary Restraining Order

The purpose of a temporary restraining order or preliminary injunction is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are determined. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). Rule 65(a)(1) permits the court to issue a preliminary injunction on notice to the adverse party. F.R.Civ.P. 65(a)(1). “A preliminary injunction is an extraordinary remedy never awarded as of right.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008); see Munaf v. Geren, 553 U.S. 674, 689-90 (2008). In every case, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” Winter, 555 U.S. at 23.

To obtain a preliminary injunction, the moving party must “establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”⁹ Winter, 555 U.S. at 20; see Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009). Shortly after Winter, the Ninth Circuit appeared to abrogate its “sliding scale” approach stating that “[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). However, the Ninth Circuit has since held that its “sliding scale test for

⁹ Prior to Winter, the Ninth Circuit recognized two differing standards for the issuance of a preliminary injunction. The traditional test required the plaintiff to establish “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” Taylor v. Wesly, 488 F.3d 1197, 1200 (9th Cir. 2007). The “alternative test” or “sliding scale” approach required that “plaintiff demonstrate either a combination of a probable success on the merits and the possibility of irreparable injury or that serious 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.

1 preliminary injunctions remains viable after the Supreme Court’s decision in Winter.” Alliance
2 for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011). It must, however, be
3 “applied as part of the four-element Winter test. That is, “‘serious questions going to the merits’
4 and a balance of hardships that tips sharply toward the plaintiff can support issuance of a
5 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable
6 injury and that the injunction is in the public interest.” Id. at 1135. Under either standard, a
7 temporary restraining order must not issue absent a showing that it is necessary to preserve the
8 status quo and prevent irreparable harm pending a hearing on a preliminary injunction. See
9 Granny Goose Foods, Inc. v. Bhd of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S.
10 423, 440 (1974).

11 1. Likelihood of success on the merits.

12 Kim has neither established that he is likely to succeed on the merits of a claim that
13 would entitle him to the equitable remedy he seeks nor that serious questions go to the merits and
14 a balance of hardships tips sharply in his favor. Kim’s Complaint alleges that a case in
15 controversy exists between Kim and Urban Commons with respect to their respective lien rights
16 in the Property due to alleged defects in Urban Commons’ NOD and NOS in violation of Cal.
17 Civ. Code § 2924 et seq. Kim’s complaint is verified as required by F.R.Civ.P. 65(b)(1)(A), but
18 neither Kim’s Complaint nor Kim’s Application set forth specific facts which clearly show that
19 immediate and irreparable injury, loss, or damage will result to Kim absent injunctive relief.
20 Kim does not discuss in the Application the likelihood of success on the merits of his claim
21 regarding Urban Commons’ allegedly defective NOD and NOS nor does he provide a declaration
22 or other evidence to demonstrate a likelihood of success on the merits of such claim.¹⁰ Instead,

23 ¹⁰ LBR 9013-1(I) entitled Evidence on Motions, Responses to Motions, or Reply Papers, states:

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25 Factual contentions involved in any motion, opposition or other response to a motion, or
26 reply papers, must be presented, heard, and determined upon declarations and other
27 written evidence. The verification of a motion is not sufficient to constitute evidence on
a motion, unless otherwise ordered by the court.

1 Kim argues that he “is likely to succeed on the merits in [his] efforts to confirm a plan.”¹¹

2 By order entered on April 5, 2012, the court granted relief from the automatic stay in the
3 above referenced bankruptcy case pursuant to 11 U.S.C. § 362(d)(2) to permit Urban Commons
4 to exercise its statutory and contractual rights with respect to the Property. In doing so, the court
5 found that Urban Commons had carried its burden to establish that Goldenpark had no equity in
6 the Property.¹² The court also determined that Goldenpark had failed to establish that the
7 Property was necessary for an effective reorganization, i.e., that Goldenpark had formulated a
8 feasible plan of reorganization; that the Property was essential to the success of the plan, and that
9 a successful reorganization within a reasonable period of time was plausible.

10 In its findings stated on the record at a hearing on April 4, 2012, the court determined that
11 (a) the Property is Goldenpark’s only significant asset; (b) that this was Goldenpark’s second
12 chapter 11 case filed to protect the Property from foreclosure; (c) that Goldenpark filed its first
13 chapter 11 petition in Case No. 2:11-bk-30070-PC, In re Goldenpark, LLC, Debtor, on May 8,
14 2011; (d) that prior to the filing, Urban Commons had recorded a NOD on January 10, 2011, and
15 recorded a NOS on April 20, 2011; (e) that a foreclosure sale of the Property was set for May 11,
16 2011; (f) that Goldenpark filed its first chapter 11 petition on May 8, 2011 to stop the foreclosure

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19 The court grants Plaintiff’s Request for Judicial Notice pursuant to F.R.Evid. 201(c). In doing
20 so, however, the court does not accept as true the information contained in the documents
21 attached to Plaintiff’s Request for Judicial Notice absent admissibility for truth under an
22 applicable an exception to the hearsay rule. Neither the declaration of Kevin L. Fritch regarding
the value of the Property nor the declaration of Santhosh Pillai regarding financial projections
are relevant to the alleged case or controversy between Kim and Urban Commons made the basis
of Kim’s Complaint.

23 ¹¹ Application, 12:12-13.

24 ¹² According to the evidence, the Property had a value as of the petition date of between
25 \$15,200,000 and \$19,500,000. Movant offered evidence that the liens against the Property
26 totaled \$21,591.835. Goldenpark did not offer evidence to the contrary. and said causes of
27 action are dismissed with prejudice

1 sale; (g) that Goldenpark remained under the protection of this court for 8 months in the first case
2 during which time it was unable to propose a confirmable plan; (h) that Goldenpark's first case
3 was dismissed for cause on February 3, 2012; (i) that Goldenpark filed its second voluntary
4 chapter 11 petition in this case on February 6, 2012 – 3 days after entry of the order dismissing
5 the prior case; and (j) that Goldenpark did not present credible evidence that confirmation of a
6 plan that would satisfy the requirements of 11 U.S.C. § 1129 and pass muster under the
7 Doubletree Franchise License Agreement, which contained a clause prohibiting (1) a transfer of
8 any equity interest or (2) the Agreement itself, or (3) any rights or obligations under the
9 Agreement, was plausible within a reasonable period of time.

10 On May 3, 2012, Kim filed a voluntary chapter 13 petition in Case No. 2:12-bk-25635-
11 JB, In re Kay Nam Kim, Debtor. The effect of Kim's bankruptcy petition was to further stay
12 Urban Common's efforts to foreclose its liens on the Property. On May 4, 2012, Urban
13 Commons filed a motion seeking relief from the automatic stay in Kim's bankruptcy case to
14 exercise its rights with respect to the Property. After a hearing on May 22, 2012, the court
15 entered an Order Granting Motion for Relief from Automatic Stay of Urban Commons
16 Sycamore, LLC on June 28, 2012, which lifted the stay in Kim's bankruptcy case under 11
17 U.S.C. § 362(d)(2) to permit Urban Commons to proceed against the Property. In its
18 Memorandum Decision of even date therewith, Judge Brand found that Kim had no equity in the
19 Property and that his third lien on the Property was not necessary for an effective reorganization
20 in his bankruptcy case. In so holding, Judge Brand observed that:

21 [Kim's] arguments and statements in opposition to the Motion are telling in this regard.
22 [Kim] does not assert that he will pursue foreclosure. Instead, he asserts that Goldenpark
23 should be given more time to sell the Hotel Property. However, the court in
24 Goldenpark's bankruptcy has already granted relief from the automatic stay to Urban
25 Commons to proceed with foreclosure.¹³

25 ¹³ Memorandum of Decision on Motion for Relief from Automatic Stay of Urban Commons
26 Sycamore, LLC filed in Case No. 2:12-bk-25635-JB, In re Kay Nam Kim, Debtor, on June 27,
27 2012 [Dkt. # 44].

1 Indeed, there was nothing in Kim's opposition to Urban Common's motion for relief from the
2 stay regarding the alleged defects in Urban Commons' NOD and NOS. It does not appear that
3 Kim raised this issue in conjunction with the hearing before Judge Brand.

4 Kim asserts broad conclusions, but he has not presented sufficient factual evidence for
5 the court to conclude that Urban Commons' NOD or NOS may be defective under Cal. Civ. Code §
6 § 2924 et seq. A more developed factual showing is required to demonstrate a likelihood of
7 success on the merits of his Complaint. Kim's Complaint essentially alleges a two-party dispute
8 between two lienholders with respect to their rights in property that is no longer subject to the
9 automatic stay because the court has previously determined that Goldenpark, the debtor in
10 possession, has no equity in the Property and the Property is not necessary to an effective
11 reorganization in Goldenpark's bankruptcy case. The court has lifted the stay to permit Urban
12 Commons to exercise its contractual and statutory rights under state law with respect to the
13 Property. Goldenpark is not a party to this adversary proceeding. To the extent any dispute
14 actually exists between Urban Commons and Kim as lienholders, the dispute arises under state
15 law and can be timely and properly adjudicated in state court.

16 2. Irreparable injury

17 Kim must demonstrate that irreparable injury is likely in the absence of an injunction.
18 Winter, 555 U.S. at 20. Even if the court were to accept the statements in the Application as true,
19 "[e]conomic injury alone does not support a finding of irreparable harm because such injury can
20 be remedied by a damage award." Ohanian v. Irwin (In re Irwin), 338 B.R. 839, 854 (E.D. Cal.
21 2006) (citing Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597,
22 603 (9th Cir. 1991). "Mere financial injury, . . . , will not constitute irreparable harm if adequate
23 compensatory relief will be available in the course of litigation." Goldie's Bookstore, Inc. v.
24 Superior Court of State of Cal., 739 F.2d 466, 471 (9th Cir. 1984) (affirming trial court's
25 decision not to enjoin the loss of a commercial leasehold). Because the Property is a commercial
26 property and Kim's allegations of irreparable harm are predicated upon financial injury, the court
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1 finds that Kim has failed to demonstrate the likelihood of irreparable injury in the absence of
2 injunctive relief.

3 Kim has not shown that he will suffer irreparable harm from a denial of an injunction.
4 Absent a showing sufficient to find irreparable harm to Kim, there is nothing to tip the balance of
5 equities in Kim's favor. See Oakland Tribune, Inc. V. Chronicle Pub. Co., 762 F.2d 1374, 1376
6 (9th Cir. 1985) ("Under any formulation of the test, plaintiff must demonstrate that there exists a
7 significant threat of irreparable injury. Because the Tribune has not made that minimum showing
8 we need not decide whether it is likely to succeed on the merits." (citations omitted)).

9 B. Reinstatement of the Stay

10 To the extent that Kim's Application seeks a reinstatement of the automatic stay, the
11 Ninth Circuit has stated that "[b]ecause the stay under § 362 is 'automatic' and 'self-
12 executing' only upon the filing of a bankruptcy petition, no authority exists for 'reinstating' an
13 automatic stay that has been lifted" by the court. Canter v. Canter (In re Canter), 299 F.3d 1150,
14 1155 n.5 (9th Cir. 2002).

15 C. Imposition of a Stay under 11 U.S.C. § 105(a)

16 To the extent that Kim's Application seeks the imposition of a stay under 11 U.S.C. §
17 105(a) as interpreted by the Ninth Circuit in In re Excel Innovations, Inc., 502 F.3d 1086 (9th
18 Cir. 2007), the request is denied. In Excel Innovations, the Ninth Circuit held that "a debtor
19 seeking to stay an action against a non-debtor must show a reasonable likelihood of a successful
20 reorganization." (emphasis added). Excel Innovations is not applicable to the facts of this case.
21 Goldenpark, not Kim, is the debtor in this bankruptcy case. Goldenpark is the owner of the
22 Property, but Goldenpark has not applied for a temporary restraining order or preliminary
23 injunction. The court has entered a final order lifting the stay to permit Urban Commons to
24 exercise its rights with respect to the Property based upon a finding that Goldenpark does not
25 have equity in the Property and Goldenpark failed to demonstrate that the Property was necessary
26 for an effective reorganization. To the extent that Kim is the proponent of a plan in the
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1 Goldenpark case, the court has determined that Kim has failed to satisfy the standard for
2 injunctive relief based upon the factual evidence presented and the claim made the basis of Kim's
3 Complaint under either Winter's four-part test or the Ninth Circuit's sliding scale approach as
4 modified after Winter.

5 III. CONCLUSION

6 Based on the foregoing, Kim's Application must be denied with respect to the issuance of
7 a TRO. The court will enter a separate order consistent with this opinion.

8 Dated: July 10, 2012

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10 /s/
11 PETER H. CARROLL
12 United States Bankruptcy Judge
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In re:	CHAPTER:
Debtor(s).	CASE NUMBER:

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled 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:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **07-10-2012**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- Thomas M Geher tmg@jmbm.com
- Giovanni Orantes go@gobklaw.com, gorantes@orantes-law.com,cmh@gobklaw.com
- United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

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:

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page