

12-32118-C-9  
MOTION  
DEBTOR: CITY OF STOCKTON, CALIFORNIA  
JUDGE: HON. C. KLEIN

FILED 3/11/13 - 12:40 PM  
CLERK, U.S. BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION shbs  
RECEIPT NO: 2-13-04854 \$176.00

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9 UNITED STATES BANKRUPTCY COURT  
10 FOR THE EASTERN DISTRICT OF CALIFORNIA

11 In Re: City of Stockton, California, ) Case No.: 2012-32118  
12 Debtor. ) Docket Control No.: SEJ-1  
13 ) Chapter 9  
14 )  
15 ) **E. GREG KENT AND BEVERLY C.**  
16 ) **KENT'S MOTION AND MEMORANDUM**  
17 ) **OF POINTS AND AUTHORITIES IN**  
18 ) **SUPPORT OF MOTION AND MOTION**  
19 ) **FOR RELIEF FROM STAY TO**  
20 ) **PROCEED WITH THE PENDING SAN**  
21 ) **JOAQUIN COUNTY SUPERIOR COURT**  
22 ) **CASE**  
23 )  
24 ) **Date: April 23, 2013**  
25 ) **Time: 9:30 a.m.**  
26 ) **Ctrm: 35**

27 **TO THE HONORABLE CHRISTOPHER M. KLEIN, UNITED STATES**  
28 **BANKRUPTCY JUDGE, DEBTOR, DEBTOR'S ATTORNEY, THE UNITED STATES**  
**TRUSTEE AND OTHER PARTIES IN INTEREST:**

PLEASE TAKE NOTICE that E. Greg Kent and Beverly C. Kent have filed this Motion for Relief from Stay to proceed with the pending San Joaquin County Superior Court Case no. 39-2012-00279803-CU-EI-STK entitled *E. Greg Kent, et al. v. City of Stockton, et al.*

The Motion is based on the Notice of Motion, this Motion with Memorandum of Points and Authorities, the Declaration of Scott E. Jenny, the Declaration of E. Greg Kent.

E. GREG KENT AND BEVERLY C. KENT'S MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION AND MOTION FOR RELIEF FROM STAY TO PROCEED WITH THE PENDING SAN JOAQUIN COUNTY SUPERIOR COURT CASE

1 The Docket Control Number of this Motion is SEJ-1. The hearing will take place on  
2 April 23, 2013 at 9:30 a.m. before the Honorable Christopher M. Klein in Department C,  
3 Courtroom 35 of the California Eastern District Bankruptcy Court, Sacramento Division, located  
4 at 5011 I Street, Suite 3-200, Sacramento, California 95814.

5 **MEMORANDUM OF POINTS AND AUTHORITIES:**

6 **I. STATEMENT OF FACTS.**

7 On January 26, 2012, plaintiffs E. Greg Kent and Beverly Kent filed San Joaquin  
8 Superior Court Action No. 39-2012-00279803-CU-EI-STK against three defendants: The City  
9 of Stockton; Universal Field Services, Inc., and California Ammonia Company (CALAMCO).  
10 The gravamen of the complaint is that CALAMCO breached its lease with plaintiffs, leaving the  
11 property before the expiration of the lease, owing some \$70,000.00 in unpaid rent. The  
12 complaint alleges that defendants City of Stockton and Universal Field Services assisted and  
13 encouraged CALAMCO to breach the lease because of a looming eminent domain case. The  
14 eminent domain case went to jury verdict, but only included the value of the property and not the  
15 loss of rent (the City of Stockton was not the condemning agency, CalTrans condemned the  
16 property).

17 On June 28, 2012, one defendant, the City of Stockton, filed a bankruptcy petition under  
18 chapter 9 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et. seq.* On July 9, 2012,  
19 plaintiffs received a DEBTOR CITY OF STOCKTON'S NOTICE OF AUTOMATIC STAY  
20 which stayed the entire action by way of automatic stay.

21 Plaintiffs now request a relief of stay from the bankruptcy proceedings against all three  
22 defendants. In the alternative, if this court is not inclined to remove the stay from the debtor City  
23 of Stockton, plaintiffs request that there be a partial relief of the stay so that plaintiffs may  
24 proceed with their case against non-bankruptcy defendants Universal Field Services, Inc. and  
25 CALAMCO.

1           **II. RELIEF FROM STAY SHOULD BE GRANTED UNDER SECTION 362(d)**  
2           **SO THAT THE SUPERIOR COURT CASE IS ADJUDICATED.**

3           In this Motion for Relief from Stay, the party opposing the relief has the burden of proof  
4 as to a lack of cause (see 11 U.S.C. §362(g)(2)). The City of Stockton thus has the burden of  
5 proof to show lack of cause for relief from the stay. Cause is a generic concept without a  
6 specific definition that is committed to the sound discretion of the bankruptcy court on a case-by-  
7 case basis. Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Cnters., Inc.), 96 F.3d 346, 351-  
8 52 (9<sup>th</sup> Cir. 1996)(chapter 11). Allowing a matter to proceed in another forum may constitute  
9 “cause” for relief from stay; in deciding whether to grant relief, the bankruptcy court must weigh  
10 the interest of the estate against hardships that will be incurred by creditor plaintiff. *In re*  
11 *Parkinson, Bkrcty. C.D. III 1988, 102 B.R. 141.* In *In re Bock Laundry Mach. Co.*, 37 B.R. 564  
12 (Bkrcty. 1984), the court stated:

13           “[t]he test is whether or not: a) any “great prejudice” to either the  
14 bankruptcy estate or the debtor will result from continuation of the civil  
15 suit, b) the hardship to the plaintiff by maintenance of the stay  
16 considerably outweighs the hardship to the debtor, and c) the creditor-  
17 plaintiff has a probability of prevailing on the merits of his case.

18           In prior decisions, the Courts have considered a variety of factors  
19 which affect the balancing of the interests. Of predominant importance  
20 in these decisions have been the hardships to the plaintiff of protracted  
21 litigation and the expense of time and money to the Debtor-in-  
22 Possession in defending these actions. A number of Courts have  
23 attributed a considerable weight to the fact that a plaintiff, by having to  
24 wait, may effectively be denied an opportunity to litigate. The aging of  
25 evidence, loss of witnesses, and crowded court dockets are factors  
26 which contribute to these hardships. The opinions reflect that the  
27 Courts have regarded the opportunity to litigate the issue of liability as  
28 a significant right which cannot be easily set aside, despite the  
existence of a bankruptcy proceeding. They have also considered as  
significant the judicial economy of continuing existing actions rather  
than beginning the suit anew in another forum.

          The Courts have not, however, ascribed much significance to the fact  
that the debtor will be required to participate in their defense, especially  
when the debtor’s insurer is obligated to provide counsel... (Citations  
omitted.)”

1 In the present case, this balancing test falls in favor of a relief from this stay as to all three  
2 defendants, and certainly from the two non-bankruptcy defendants.

3 **1. Prejudice.** The plaintiffs are being prejudiced from the delay of this action.  
4 Discovery has been placed at a stand-still, before a single deposition has been taken. Verbal  
5 testimony is growing old and less reliable. Written evidence may disappear over time (not  
6 through intentional spoliation, but mere filing, purging, etc.). Plaintiffs are entitled to have at  
7 least liability established while the evidence is reasonably fresh.

8 **2. Crowded court dockets.** The civil court dockets in the State of California are at  
9 an all-time high in terms of congestion. If plaintiffs are forced to wait for the bankruptcy to be  
10 resolved, it may take additional years before the case can find a home in a courtroom.

11 **3. Defense of the debtor.** The City of Stockton is litigating this case using its own  
12 in-house counsel. The entire case has been handled by Deputy City Attorney Michael Roush.  
13 Thus, a relief of stay will not cause the City of Stockton any additional costs by way of  
14 attorney's fees.

15 **4. Liability.** Liability can be determined now, even if a judgment falls under the  
16 protection of the bankruptcy. This would allow the plaintiffs to attempt to obtain a judgment  
17 against all three defendants, and if successful, collect from the non-bankrupt defendants  
18 immediately.

19 **5. Fifth Amendment Grounds.** The bankruptcy code generally permits a debtor to  
20 reorganize its debts so long as the property rights protected by the Fifth Amendment are  
21 respected. (*In re Elmore* (1988) 94 B.R.670, at 676.) Thus, while a debtor's obligation under a  
22 contract may be discharged in most instances, "bankruptcy power is subject to the Fifth  
23 Amendment's prohibition against taking private property without compensation." (*United States*  
24 *v. Sec. Indus. Bank*, (1982) 459 U.S. 70, 75.) The Fifth Amendment specifically states that  
25 private property shall not be taken for a public use without just compensation. The complaint  
26 against the City of Stockton is for inverse condemnation, the taking of plaintiffs' property  
27 without payment of just compensation. The complaint specifically alleges that through the acts

1 of defendant City of Stockton, plaintiffs' property has been taken from plaintiffs without  
2 payment of just compensation (Complaint, Par. 8).

3 The complaint states in Par. 9:

4 The CITY prepared a "Hold Vacant Agreement" whereby the  
5 CITY admitted it was going to remove tenant CALAMCO from  
6 the premises and in return promised to pay to plaintiffs \$5,892.00  
7 per month from April 1, 2009 until "the close of escrow for the  
8 City's acquisition of the Property" or "the effective date of an  
9 Order for Immediate Possession of the Property." The City never  
10 closed escrow on the property. Another government agency,  
CALTRANS, filed an eminent domain action and obtained an  
Order for Immediate Possession which took effect 30 days after the  
service of the notice of entry of order, making the effective date of

11 possession February 28, 2010 (which is the date of the  
12 "condemnation" of the property for all purposes in the lease). The  
13 subject property was not taken for public use prior to February 28,  
2010. Based upon the promises of CITY and CALAMCO, the  
14 Kents signed the CITY's agreement on November 9, 2009 and  
15 returned the agreement to CITY. A copy of the agreement signed  
16 by the plaintiffs is attached hereto as Exhibit B. The CITY failed  
to pay any sums due for lost rent, failed to honor the terms of the  
Hold Vacant Agreement, and continues to refuse to do so.

17 Therefore, under *Elmore* and *Sec. Indus. Bank*, and under the Fifth Amendment to the  
18 United States Constitution, the plaintiffs should be permitted to proceed with their claims for the  
19 violation of their constitutional rights.

20 **III. CONCLUSION.**

21 Plaintiffs request a relief of stay from the bankruptcy proceedings against all three  
22 defendants. In the alternative, if this court is not inclined to remove the stay from the debtor City  
23 of Stockton, plaintiffs request that there be a partial relief of the stay so that plaintiffs may

24 ///

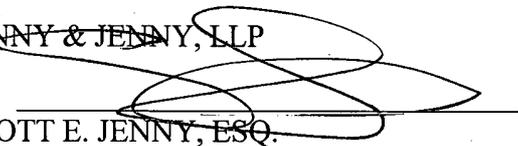
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26 ///

1 proceed with their case against non-bankruptcy defendants Universal Field Services, Inc. and  
2 CALAMCO.

3 DATED: March 6, 2013

JENNY & JENNY, LLP

4 By: 

5 SCOTT E. JENNY, ESQ.

6 ATTORNEYS FOR PLAINTIFFS AND  
7 MOVANTS E. GREG KENT AND BEVERLY  
8 C. KENT