

THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:



DATED: August 13, 2019


G. Michael Halfenger
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Velicia Buchanan,

Debtor.

Case No. 16-30201-gmh
Chapter 13

**ORDER ON DEBTOR'S REQUEST TO VACATE ORDER GRANTING
U.S. BANK TRUST, N.A., RELIEF FROM AUTOMATIC STAY**

Velicia Buchanan's confirmed chapter 13 plan provides that she will maintain payments while the case is pending on the claim of U.S. Bank Trust, N.A., which is secured by her principal residence. See ECF No. 13, §6(B). In May 2018, after Buchanan purportedly failed to make regular payments to U.S. Bank Trust for several months, U.S. Bank Trust moved for relief from the automatic stay. ECF No. 85. Buchanan's attorney filed an objection to the motion explaining that Buchanan "filed a letter with the Court indicating that she paid the amount owed . . . after she received the Bank's motion for relief from stay" but that her attorney had "not been able to reach [her]" to "obtain . . . verification of the payment." ECF No. 87, at 2; see also ECF No. 86.

The parties resolved their differences at a hearing on U.S. Bank Trust's motion held on June 26, 2018. Among other things, Buchanan agreed to pay the post-petition arrearage of about \$4,100 over 18 months by increasing her monthly mortgage payments by about \$225 during that period. She further agreed to a "doomsday" provision on the increased payments, meaning that U.S. Bank Trust would be entitled to immediate relief from the stay upon its submission of an affidavit attesting that Buchanan failed to timely make such a payment. The court gave effect to the parties' agreement, including the doomsday provision, by order entered July 6, 2018. ECF No. 94.

On July 30, 2019, U.S. Bank Trust filed an affidavit of an employee of the loan servicer, Caliber Home Loans, attesting that Buchanan "failed to comply with the court's order by failing to make the payments beginning with the payment due on April 16, 2019." ECF No. 102, at 3. On August 6, before the court granted U.S. Bank Trust relief from the stay, Buchanan's counsel filed an "objection" to the affidavit of default. ECF No. 104. After reciting the procedural history, the objection explains that counsel "believes that if the debtor has not made the payments alleged in the Bank's motion[,] there may be extenuating circumstances which caused the debtor to stop making her payments". *Id.* at 2. The objection explains that counsel has not heard from the debtor:

[C]ounsel has tried - by regular mail and numerous telephone calls - to reach the debtor to try to determine whether and/or why the debtor may have missed her payments. Counsel has been unable to reach the debtor to discuss these allegations[] and is without information sufficient to respond to the Bank's assertions.

Id. Nevertheless, counsel elected to "object[] to the motion on debtor's behalf and ask[ed] that he be allowed to supplement this objection with additional information once he is able to discuss the circumstances with the debtor." *Id.*

On August 7, the court overruled the debtor's objection as baseless for the reasons stated in *In re Gouthro*, No. 12-35699 (Bankr. E.D. Wis. June 29, 2016), ECF

No. 47. *Gouthro* explains, and it is worth repeating here, that “[t]here are only two potential non-frivolous responses” to an affidavit of default triggering a doomsday provision:

(1) an objection that contends that the [] affidavit is factually erroneous and the debtor[] performed as ordered, or (2) a request that the court expand the time set by the order for the debtor[] to perform. The second option requires that the debtor[] establish excusable neglect under Federal Rule of Bankruptcy Procedure 9006(b)(1). Both courses require a sufficiently detailed statement of facts to justify an evidentiary hearing about whether the [affiant’s] averments were false or whether the debtors’ default resulted from excusable neglect.

Id. at 2–3. The objection that Buchanan’s counsel filed neither contends that U.S. Bank Trust’s affidavit is erroneous nor shows excusable neglect. Accordingly, the court granted U.S. Bank Trust the stay relief provided for under the doomsday provision. ECF No. 105.

About two hours later, Buchanan’s counsel filed a letter explaining that, earlier that day,

[His] office had received an e-mail from the debtor that contained information suggesting that while she may have technically violated the terms of the . . . “doomsday” order, there were not only extenuating circumstances for the violation, but that she had also made payments to the bank that had not been accounted for in the bank’s affidavit of default.

ECF No. 106, at 1. The letter “ask[s] the court to rescind its . . . order granting relief from the stay and set this matter for hearing so that these circumstances can be more fully explored.” *Id.* at 2.

This request for an order vacating the August 7 order was not properly made. “A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing.” Fed. R. Bankr. P. 9013. And, because this is “a contested matter not otherwise governed by the[] rules,” the party seeking relief must request it “by motion” and “afford[] the party against whom relief is

sought” both “reasonable notice and opportunity for hearing”. Fed. R. Bankr. P. 9014(a). Buchanan did not do that here. While U.S. Bank Trust’s counsel received electronic notice of the filing by Buchanan’s counsel of the August 7 letter, such notice did not identify the request for relief or specify an opportunity to object or request a hearing. Moreover, the letter does not “state with particularity the grounds” for “the relief or order sought”, as required by Federal Rule of Bankruptcy Procedure 9013, or “state the Bankruptcy Code sections, Federal Rules of Bankruptcy Procedure, and other authority on which” the request for relief is based, as Local Rule 9013 mandates.

For these reasons, the court will take no further action on the letter filed by Buchanan’s counsel on August 7.

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