

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 4, 2020 at 1:30 p.m.

1. [19-28015-E-13](#) **ALIAKSEI FLIAHA** **MOTION FOR RELIEF FROM**
[HRH-1](#) **Mark Shmorgon** **AUTOMATIC STAY**
 1-21-20 [28]

BMO HARRIS BANK N.A. VS.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on January 21, 2020. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

<p>The Motion for Relief from the Automatic Stay is granted, the stipulation of Movant and Debtor having been filed with the court.</p>
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BMO Harris Bank N.A. ("Movant") seeks relief from the automatic stay with respect to an asset identified as:

1. 2017 Volvo VNL Series VNL64T/670 Tractor Truck, VIN ending in

0619,

2. 2018 Wabash Dry Van, VIN ending in 7759,
3. 2019 Wabash Dry Van, VIN ending in 5666,
4. 2019 Wabash Dry Van, VIN ending in 5687,
5. 2019 Wabash Dry Van, VIN ending in 5643,
6. 2018 Volvo VNL Series VNL64T/670 Tractor Truck, VIN ending in 9809, and
7. 2018 Volvo VNL SERIES VNL64T/670 Tractor Truck, VIN ending in 9799 (collectively “Vehicles”).

The moving party has provided the Declaration of Kimberly Mundt to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Aliaksei Fliaha (“Debtor”).

Movant provides evidence that there are three (3) pre-petition payments in default for the 2017 Volvo truck and both of the 2018 Volvo trucks, with a pre-petition arrearage totaling \$25,774.68. Declaration, Dckt. 32.

DISCUSSION

On January 30, 2020, Movant and Debtor filed a Stipulation to the present Motion for Relief from the Automatic Stay. Dckt. 49. The parties stipulate to the following:

- A. The Motion is denied without prejudice as to the 2017 Volvo VNL Series VNL64T/670 Tractor Truck, VIN ending in 0619 and the 2018 Wabash Dry Van, VIN ending in 7759. These two Vehicles along with their associated claims shall be paid in full, with interest at the rate of 6% per annum, through the Chapter 13 Plan as a Class 2A.
- B. The Motion is granted as to following Vehicles:
 1. 2019 Wabash Dry Van, VIN ending in 5666,
 2. 2019 Wabash Dry Van, VIN ending in 5687,
 3. 2019 Wabash Dry Van, VIN ending in 5643,
 4. 2018 Volvo VNL Series VNL64T/670 Tractor Truck, VIN ending in 9809, and
 5. 2018 Volvo VNL SERIES VNL64T/670 Tractor Truck, VIN ending in 9799.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the assets listed above as 1 through 5.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant and Debtor stipulate for the court to grant relief from the Rule as adopted by the United States Supreme Court.

The Stipulation providing for such relief, the court waives the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by BMO Harris Bank N.A. (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicles, under its security agreement, loan documents granting it a lien in the assets identified as:

1. 2019 Wabash Dry Van, VIN ending in 5666,
2. 2019 Wabash Dry Van, VIN ending in 5687,
3. 2019 Wabash Dry Van, VIN ending in 5643,
4. 2018 Volvo VNL Series VNL64T/670 Tractor Truck, VIN ending in 9809, and
5. 2018 Volvo VNL SERIES VNL64T/670 Tractor Truck, VIN ending in 9799,

and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause as to the Vehicles listed above.

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are denied as to the following Vehicles:

1. 2017 Volvo VNL Series VNL64T/670 Tractor Truck, VIN ending in 0619, and
2. 2018 Wabash Dry Van, VIN ending in 7759.

Both to be paid in full, with interest at the rate of 6% per annum, through the Chapter 13 Plan as a Class 2A.

No other or additional relief is granted.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), and Office of the United States Trustee on November 5, 2019. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion to Dismiss Case is XXXXXXXXXX.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. the debtor, Thomas Ivers ("Debtor"), is causing unreasonable delay that is prejudicial to creditors.
2. Debtor has failed to file a plan.

DISCUSSION

No Pending Plan

Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on October 1, 2019. A review of the docket shows that Debtor has not yet filed a new plan or a motion to confirm a plan. Debtor offers no explanation for the delay in setting a plan for confirmation. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

November 26, 2019 - Initial Hearing on Legal Competency

Debtor's conduct in this case raises some concerns relating to his legal competency as it relates to his real property, representations that he understands the urgent need to sell the property in light of his years of default and imminent foreclosure sale, the obligation owed to his daughter that is secured by a junior deed of trust against the property, and the apparent value of the property that would at least pay his daughter's claim and generate some monies for Debtor.

As this court addressed in the Memorandum Opinion and Decision issued with the Order referring the Debtor to Adult Protective Services, Debtor and his daughter (who has been served with several of the court's orders and ruling identifying these concerns) have not come forward to protect their apparent economic interests.

At the November 26, 2019 hearing, the Trustee concurred in continuing the hearing on this Motion to the date and time of the continued hearing on the Referral of the Debtor to Adult Protective Services and the Motion for Relief From the Automatic Stay.

December 17, 2019 Continued Hearing

At the December 17, 2019 hearing, the Debtor had not yet moved forward with getting counsel to get a broker appointed, a representative appointed, and the Property marketed for sale. Adult Protective Services did not present the court with a recommendation for a limited purpose representative.

The court has delayed the foreclosure on the Debtor's property until after January 31, 2020, to afford Debtor, Debtor's Daughter, and the Adult Protective Services a final opportunity to get a representative before the court and Debtor moving forward with the active marketing and sale of the Property.

However, the court ultimately issued an order modifying the automatic stay on December 18, 2019, (Order, Dckt. 183) granting relief from the automatic stay effective January 31, 2020 to allow creditor to proceed with a foreclosure sale.

~~The court shall issue a minute order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Dismiss filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted/denied without prejudice and this Chapter 13 case is dismissed.~~

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor , Debtor’s Attorney, Chapter 13 Trustee, Office of the United States Trustee on January 6, 2020. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<p>The Motion for Relief from the Automatic Stay is granted.</p>

U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, by Caliber Home Loans, Inc., as its attorney in fact (“Movant”) seeks relief from the automatic stay with respect to Rudy P. Orpilla and Felicidad A. Orpilla’s (“Debtor”) real property commonly known as 1114 Montague Lane, Lincoln, California (“Property”). Movant has provided the Declaration of Karla Price to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made three (3) post-petition payments, with a total of \$5,987.19 in post-petition payments past due. Declaration, Dckt. 53.

CHAPTER 13 TRUSTEE’S RESPONSE

David P. Cusick (“the Chapter 13 Trustee”) filed a Response on January 13, 2020. Dckt. 60. Trustee request the court take into consideration that Debtor does not have a confirmed plan; no plan is

pending; and Trustee has made no disbursements in this case.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$608,126.34 (Declaration, Dckt. 53), while the value of the Property is determined to be \$395,000.00, as stated in Schedules B and D filed by Debtor.

According to Debtor's Amended Plan, Debtor intends to surrender the Property. Dckt. 28.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, by Caliber Home Loans, Inc., as its attorney in fact (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 1114 Montague Lane, Lincoln, California, (“Property”) to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other or additional relief is granted.