

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

February 10, 2015 at 1:30 p.m.

1. [12-26118](#)-E-13 GORDON/JULIE PLATT MOTION FOR RELIEF FROM
APN-1 Eric John Schwab AUTOMATIC STAY
1-12-15 [[34](#)]
SANTANDER CONSUMER USA, INC.
VS.

Tentative Ruling: 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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

Correct 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 12, 2015. 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties 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.

The Motion for Relief From the Automatic Stay is denied without prejudice.

February 10, 2015 at 1:30 p.m.

Gordon Murray and Julie Platt ("Debtor") commenced this bankruptcy case on March 29, 2012. Santanader Consumer USA Inc., ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2003 Toyota RAV 4, VIN ending in 4339 (the "Vehicle"). The moving party has provided the Declaration of Monica Resendez to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Monica Resendez Declaration provides testimony that Debtor has not made 2 post-petition payments, with a total of \$766.84 in post-petition payments past due. The Declaration also provides evidence that there are 3 pre-petition payments in default, with a pre-petition arrearage of \$1,413.63.

The Motion also alleges that the vehicle securing the claim was in an accident at some unstated time. It is further alleged that the vehicle was determined to be a total loss by the Debtor's unidentified insurance company. Movant states that it is seeking to have unstated in amount insurance proceeds paid to Movant and to allow Movant to sell the vehicle for salvage value.

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 \$3,352.10, as stated in the Monica Resendez Declaration. The value of the Vehicle is stated to be \$9,100.00 in Schedules B and D filed by Debtor. Movant does not allege the current value of the vehicle, which appears to only be salvage value or the amount of the insurance proceeds it seeks to apply to the secured claim provided for in this plan.

Movant also alleges in the Motion that the Debtor is obligated to make monthly payments to Movant in the amount of \$367.79. Motion, pg. 2:24-25. The Motion fails to state that there is a confirmed Chapter 13 Plan in this case and the Debtor is "obligated" to pay Movant only \$131.00 a month on Movant's secured claim. Modified Chapter 13 Plan, Dckt. 25. This is more than \$200.00 a month less than that stated in the Motion.

RESPONSE TO MOTION

David Cusick, the Chapter 13 Trustee, has filed a response asserting that Debtor is current under the confirmed plan. To date, Debtor has paid a total of \$28,836.00. The Trustee reports that Movant has been paid \$3m949.76 through November 2014. The Trustee does not report as to the December and January 2015 disbursements by the Trustee. Dckt. 36.

However, the Trustee is unaware as to the extent of the insurance proceeds sought.

RULING

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. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause does not exist for terminating the automatic stay. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The existence of defaults in post-petition or pre-petition payments by

itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Vehicle for Movant's claim provides adequate protection such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

Movant fails to disclose or adequately describe the insurance proceeds which it seeks to apply to its modest remaining secured claim. The Motion does not state the amount of proceeds requested by movant. Without description of the amount of relief sought by the movant, it is impossible for the court to grant relief from stay. The court will not endorse a "blank check" to Santander Consumer USA Inc.

The Motion does not describe where the insurance proceeds are held. The court will not authorize a relief from automatic stay where the Movant would have the authority to collect insurance money, without the court's knowledge of which insurance carrier would be required to disburse the funds.

The Movant does not articulate to the court whether the insurance proceeds cover the remaining amount owed to Santander Consumer USA Inc. According to the Resendez Declaration, Debtor has an outstanding balance of \$3,352.10 owed to Movant. However, Movant does not describe whether or not they plan to apply the recovered insurance proceeds to the outstanding balance owed to them, if the proceeds would only apply to the delinquent payments or if there is a different application sought. Without this information, there is potential for a lack of transparency in determining the amount owed to movant and whether other creditors would be negatively impacted.

Movant does not state the salvage value of the Vehicle. Even if the above issues with the Motion had been resolved, the court might not grant a motion for relief from automatic stay without a description of the recovery value of the vehicle. Without this information, the court cannot determine the proper amount to be recovered by the Movant. Santander Consumer USA Inc.'s lien applies to Debtor's Vehicle. In order for the court to make an informed ruling, it is necessary to know the remaining value recoverable from the vehicle and apply only the proceeds tied to the Vehicle to the Movant.

The court also notes that Ms. Resendez in her declaration has testified under penalty of perjury that the collateral, the salvage value, totaled, Vehicle and the insurance proceeds, is "[d]epreciating and continues to depreciate while the property is not being paid and/or protected." Declaration, pg. 3:1-2; Dckt. 36. The court is perplexed as to how insurance proceeds or the scrap from the Vehicle can continue to be depreciating.

Ms. Resendez further testifies under penalty of perjury that the collateral is "not being paid and/or protected." *Id.* This statement under penalty of perjury is clearly false. Debtor has made the payments due under the confirmed Modified Plan and the Trustee reports that he is making distributions to Movant. Further, no explanation is provided as to how insurance proceeds and a salvage value vehicle are not being "protected."

These "gaps" in Ms. Resendez's testimony calls into question the credibility of all of her testimony. It may be as simple as Movant was suing its standard relief from form motion and declaration, with no one thinking that this was a non-routine situation. It may be a situation where Ms. Resendez's

review of the declaration was interrupted by a phone call as she came to the end of the declaration and her eye skimmed it without concentrating on what they said in reliance on being represented by first rate creditor counsel. Or it may be that Ms. Resendez, and Movant, have a policy of not reviewing what the declarations say, so long as they think that it says what is necessary for Movant to prevail at the hearing. FN.1.

FN.1. Given that Movant and its counsel regularly appear in this court and other pleadings do not suffer from these issues, the court is convinced that this is human error and not a systemic problem. However, identification of such errors and not letting them slip by reenforces for the good faith parties and their counsel that maintaining better practices is necessary for expeditiously presenting matters to the court.

Taking the above mentioned concerns into consideration, the court is unable to grant relief from the automatic stay. Therefore, the Motion is denied without prejudice.

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 Santanader Consumer USA Inc. ("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 Motion is denied without prejudice.