

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

Honorable Christopher M. Klein  
Bankruptcy Judge  
Sacramento, California

April 2, 2019 at 1:30 p.m.

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1. [18-27728-C-13](#) SCOTT/MELINDA BROWN MOTION FOR RELIEF FROM  
[ETW-1](#) Gary Fraley AUTOMATIC STAY  
3-6-19 [\[55\]](#)

DAVID MEYERS VS.

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**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.

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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, parties requesting special notice, and Office of the United States Trustee on March 6, 2019. 28 days' notice is required. That requirement was met.

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). The defaults of the non-responding parties and other parties in interest are entered.

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

David C. Meyers ("Movant") seeks relief from the automatic stay with respect to Scott Brown and Melinda Brown's ("Debtors") real property commonly known as 1704 10<sup>th</sup> Avenue, Olivehurst, California ("Property"). Movant has provided the Declaration of David C. Meyers to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The David C. Meyers Declaration states that there are two post-petition defaults in the payments on the obligation secured by the Property, with a total of \$1,709.12 in post-petition payments past due. The Declaration also provides evidence that there are seven pre-petition payments in default, with a pre-petition arrearage of \$5,981.92. Movant also asserts that the property is not insured.

## DEBTORS' OPPOSITION:

Debtors filed an Opposition on March 18, 2019. Dckt. 73. Debtors asserts that they have been current on all proposed Plan payments and have provided proof to the creditor that the property is insured.

## CHAPTER 13 TRUSTEE'S RESPONSE:

David Cusick ("the Chapter 13 Trustee") filed a Response on March 19, 2019. Dckt. 75. The Trustee asserts that Debtor has paid to the Trustee a total of \$2,311.00 to date. The Trustee has disbursed 2 mortgage payments to Movant totaling \$1,709.12 on February 28, 2019.

## DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$144,314.00 (as secured by Movant's first deed of trust), as stated in Movant's Declaration and Schedule D. The value of the Property is determined to be \$167,100.00, as stated in Schedules A and D.

The court notes that it denied Movant's prior request for relief from stay (Dckt. 52) because there was only one post-petition payment in default and the Debtors had an equity cushion in the property. Since the court entered its Order, Movant claims that Debtors have continued to not make post-petition payments and have not put forth a confirmable Plan. The Trustee's response states that Debtors have been making payments to the Trustee and the Trustee has disbursed payments to the creditor. The court also notes that Debtors proposed an Amended Plan on March 27, 2019 with a confirmation hearing set for May 5, 2019. Dckt. 85.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movant's claim provides adequate protection for 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).

The court shall issue an order denying Movant's request without prejudice.

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 David C. Meyers ("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 Motion for Stay Relief is denied without prejudice.

No other or additional relief is granted.

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DAVID MERCURIO VS.

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**Final Ruling:** No appearance at the April 2, 2019 hearing is required.

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**The Motion for Relief From Automatic Stay is dismissed without prejudice.**

David Mercurio, (“Secured Creditor”) having filed a “Withdrawal of Motion”, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on March 27, 2019, Dckt. 137; no prejudice to the responding party appearing by the dismissal of the Motion ; Secured Creditor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Frank Davis (“Debtor”); the Ex Parte Motion is granted, Secured Creditor’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 Stay filed by David Mercurio (“Secured Creditor”) having been presented to the court, Secured Creditor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 137, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Relief from Automatic Stay is dismissed without prejudice.

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**WELLS FARGO BANK, N.A. VS.**

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**No 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.

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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, creditors, parties requesting special notice, and United States Trustee on November 7, 2018. 28 days’ notice is required. That requirement was met.

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). The defaults of the non-responding parties and other parties in interest are entered.

**The hearing on the Motion for Relief from the Automatic Stay is ~~XXXX~~.**

Wells Fargo Bank, N.A. (“Movant”) seeks relief from the automatic stay with respect to Betty Walker’s (“Debtor”) real property commonly known as 2660 Marshfield Road, Vallejo, California (“Property”). Movant has provided the Declaration of Joselle Bracy to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Joselle Bracy Declaration states that there are five post-petition defaults in the payments on the obligation secured by the Property, with a total of \$2,208.25 in post-petition payments past due. The Declaration also provides evidence that there are ten pre-petition payments in default, with a pre-petition arrearage of \$5,145.27.

**CHAPTER 13 RESPONSE:**

The Chapter 13 Trustee responds that does not yet have a confirmed Plan. The Debtor is paid ahead \$3,514.92 under the terms of the proposed plan filed on November 10, 2018. Dckt. 67. The Debtor has paid a total of \$25,414.92 into the plan. The Trustee has not made distribution to the Movant because under the terms of the original plan Movant’s debt was omitted. The Debtor has a pending amended plan.

## DEBTOR'S OPPOSITION

Debtor filed an Opposition on November 27, 2018. Dckt. 73. Debtor asserts that the pending amended Plan set for confirmation hearing on January 15, 2018 provides for Movant's second note and deed of trust on the Property as a Class 1 claim, with ongoing monthly mortgage payments, in the amount of \$441.65, to be paid through the Trustee commencing in January 2019. The amended plan provides for the \$5,145.27 pre-petition mortgage arrears and the post-petition mortgage arrears in the amount of \$3,092.00 to be paid with the proceeds of the sale of debtor's property located at 747 Tuolumne Street, Vallejo, California. Debtor has already obtained court approval to employ realtor Gerri Kalk and the property is listed and being actively marketed. Debtor anticipates that a sale will occur within a year and will facilitate a 100% payment for all allowed claims.

## DISCUSSION:

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$514,926.84 (including \$425,056.00 secured by Movant's first deed of trust and \$89,870.84 secured by Movant's second deed of trust ), as stated in the Joselle Bracy Declaration and Schedule D. The value of the Property is determined to be \$600,000.00, as stated in Schedules A and D.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movant's claim provides adequate protection for 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).

## RULING:

Here, the Debtor has proposes a Plan to fully pay Movant and anticipates doing with through the sale of another real property asset that is actively being marketed. The proposed Plan is set for hearing on February 12, 2019, as such the court determines it is prudent to defer ruling on the Movant's requested relief until the court has considered whether the proposed Plan should be confirmed.

The court notes that on March 11, 2019 an Order confirming the Plan was confirmed. Dckt. 129. That court also notes that Debtor's Motion to Sell the subject Property is set for hearing on April 2, 2019 at 2:00 p.m.

**At the hearing -----.**

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 Wells Fargo Bank (“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 Movant’s request for relief from the automatic stay provisions of 11 U.S.C. § 362(a) are **xxxx**.

No other or additional relief is granted.

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**FORD MOTOR CREDIT COMPANY,  
LLC VS.**

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**Final Ruling:** No appearance at the April 2, 2019 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2019. 28 days’ notice is required. That requirement was met.

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.

**The Motion for Relief from the Automatic Stay is granted.**

Ford Motor Credit Company, LLC (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2015 Lincoln MKZ (“Vehicle”). The moving party has provided the Declaration of Jacklyn Larson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Cody Bedoy (“Debtor”).

The Jacklyn Larson Declaration provides testimony that Debtor has not made 3 post-petition payments, with a total of \$2,127.87 in post-petition payments past due. The Declaration also provides evidence that there are 12 pre-petition payments in default, with a pre-petition arrearage of \$8,511.48.

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 \$29,930.45, as stated in the Larson Declaration, while the value of the Vehicle is determined to be \$20,100.00, as stated in Schedules B and D filed by Debtor.

## **DISCUSSION**

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.

A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or David Cusick (“the Chapter 13 Trustee”), the court determines that there is no equity in the Vehicle for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

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 asset.

### **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 because Debtor’s Plan states that the Vehicle will be surrendered.

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 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 Ford Credit Motor Company, LLC (“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 Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2015 Lincoln MKZ (“Vehicle”), 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.

No other or additional relief is granted.

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