UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

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

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1. **18-27297-E-13 JHW-1** | **ARA/ANAHIT HOVAKIMYAN** | **MOTION FOR RELIEF FROM AUTOMATIC STAY**
Gabriel Liberman | **3-5-19 [20]**

AMERICREDIT FINANCIAL SERVICES, INC. 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.

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 5, 2019. By the court's calculation, 28 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). The defaults of the non-responding parties and other parties in interest are entered.

The court enters its order confirming that the automatic stay has been modified by the confirmed Chapter 13 Plan.

Americredit Financial Services, Inc. dba GM Financial ("Movant") seeks relief from the

automatic stay with respect to an asset identified as a 2017 Chevrolet Silverado 1500, VIN ending in 1952 ("Vehicle").

The moving party has provided the Declaration of Aaron Rangel to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Ara and Anahit Hovakimyan ("Debtor"). The Declaration purports to introduce evidence that Movant is the lienholder on the Vehicle, that the Vehicle was involved in a total loss accident, and that Debtor received insurance proceeds of insurance proceeds of $36,985.69 from the loss of the Vehicle.

Movant requests relief from the automatic stay to pursue the alleged insurance proceeds.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response indicating non-opposition to the Motion on March 19, 2019. Dckt. 27. Trustee notes a motion for relief may not be necessary given the Confirmed Plan.

DISCUSSION

Grounds Stated With Particularity in the Motion

Movant is the holder of a Retail Installment Contract for which the Debtor is the obligor and it is secured by a 2018 Chevrolet Colorado ("Vehicle"). Motion ¶ 1, Dckt. 20. A copy of the Retail Installment Contract is provided as Exhibit A. Dckt. 25. A copy of the record title showing Movant as the lien holder for the Vehicle is provided as Exhibit B (Dckt. 25).

Movant has been informed that the Vehicle was involved in a collision on January 13, 2019. Motion ¶ 3, Dckt. 20. It is alleged that the vehicle has been declared a "total loss" by Liberty Mutual Insurance, the Debtor's insurance provider. Movant is named as the loss payee on the insurance. *Id.*

The amount of the insurance proceeds are stated to be $36,985.69 to the remaining balance of $39,317.60 on Movant's secured claim. *Id.* ¶ 5.

Declaration of Aaron Rangel

The Rangel Declaration provides testimony that he is an employee of Movant who has worked in the ordinary course of business to maintain Movant's records and files pertaining to Debtor and this Contested Matter. Declaration ¶¶ 1-2, Dckt. 24. The Declaration further provides evidence to authenticate the retail sales contract between Movant and Debtor, and the Certificate of Title for the Vehicle, filed as Exhibits A and B, respectively. *Id.*, ¶¶ 3-4.

The Rangel Declaration also provides the following "testimony:"

> 5. **Movant is informed and believes** that the Vehicle was involved in a collision on January 13, 2019. The Vehicle was declared a total loss by Debtors'

> insurance carrier, Liberty Mutual Insurance. The claim number with Liberty Mutual on the Vehicle is 039013831-01, and Movant is named the loss payee.

Id., ¶ 5(emphasis added).

Inadequacy of Witness Information and Belief Testimony

The Rangel Declaration is the testimony of a witness presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. As discussed in Weinstein's Federal Evidence § 602.02:

> A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness's testimony must be based on events perceived by the witness through one of the five senses.
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> Recently, the Ninth Circuit Court of Appeal addressed this personal knowledge issue, stating:
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> Under Rule 602, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602. Rule 602 requires any witness to have sufficient memory of the events such that she is not forced to 'fill[] the gaps in her memory with hearsay or speculation.' 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE Evidence § 6023 (2d ed. 2007). Witnesses are not 'permitted to speculate, guess, or voice suspicions.' *Id.* § 6026. However, '[p]ersonal knowledge includes opinions and inferences grounded in observations and experience.' *Great Am. Assurance Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009) (citing *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999)). Lay witnesses may testify about inferences pursuant to Rule 701:
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> > If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
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> FED. R. EVID. 701.

United States v. Whittemore, 776 F.3d 1074, 1082 (9th Cir. 2015).

As discussed in Moore's Federal Practice, Civil § 8.04, the use of "information and belief" is

a pleading device for the use in a complaint (or motion) to allow a plaintiff (movant) to fill in the gaps of alleging a claim pending discovery.

> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
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> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to set forth allegations that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to permit claimants to aver facts that they believe to be true, but that lack evidentiary support at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.
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> Nothing in the *Twombly* plausibility standard (see [1], above) prevents a plaintiff from pleading on information and belief. A pleading is sufficient if the pleading as a whole, including any allegations on information and belief, states a plausible claim. On the other hand, if the pleading fails to permit a plausible inference of wrongdoing, or if the allegations are nothing more than legal conclusions, the pleading will not survive a motion to dismiss.

This is incorporated to Federal Rule of Bankruptcy Procedure 9011, which repeats the provisions of Federal Rule of Civil Procedure 11(b), stating:

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Though allowed as a pleading device, the certification required by 28 U.S.C. § 1746 does not allow testimony in declaration to be provided under penalty of perjury being true because the witness merely "is informed and believes (or desires because likely it would mean the witness party would prevail) it is true."

> § 1746. Unsworn declarations under penalty of perjury
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> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
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> > (1) If executed without the United States: "I declare (or certify, verify, or state) **under penalty of perjury** under the laws of the United States of America **that the foregoing is true and correct**. Executed on (date).
>
> (Signature)."
>
> > (2) If executed within the United States, its territories, possessions, or commonwealths: "**I declare** (or certify, verify, or state) **under penalty of perjury** that the **foregoing is true and correct**. Executed on (date).
>
> (Signature)."

28 U.S.C. § 1746 (emphasis added).

Alleged Total Loss Due to Accident

In support of the Motion, Movant provides declaration testimony that "Movant is informed and believes that the Vehicle was involved in a collision on January 13, 2019." Declaration ¶ 5, Dckt. 24. As discussed at length above, testimony provided on "information and belief" does not meet the requirements of 28 U.S.C. § 1746.

This "testimony" is not that the Declarant has any actual personal knowledge concerning the Vehicle and the occurrence of an accident.

Another substantial concern for the court is the failure to present evidence as to the insurance proceeds. The Rangel Declaration states "Movant seeks relief from the automatic stay in order to apply the insurance proceeds of $36,985.69 . . ." Declaration ¶ 6, Dckt. 24.

Other than the Declarant being "informed and believes," there is no evidence of an accident and insurance claim, no payment letter from the insurance company, no evidence of there being insurance proceeds that have or will be disbursed.

Conclusion

Debtor lists the Vehicle on Schedules A/B with a value of $30,466.00. Dckt. 1. On January 22, 2019 the court issued an Order Confirming Chapter 13 Plan which provides for Movant's claim as a Class 4. Movant has not alleged that Debtor has defaulted on its claim.

As provided in the confirmed Chapter 13 Plan, the automatic stay has already been terminated with respect to Movant's exercising its rights against any collateral securing the debt:

> "3.11. Bankruptcy stays.
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> (a) Upon confirmation of the plan, the automatic stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1301(a) are . . . (2) modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract; . . . ."

Plan ¶ 3.11, Dckt. 2; Confirmation Order, Dckt. 19.

Though the stay has been modified to allow Movant to proceed against the collateral, which Movant asserts is collateral for the secured claim as the "loss payee," it may be that Movant needs an order confirming this for the insurance company to disburse the proceeds or it wants to make sure that such modification continues if this case is converted to one under Chapter 7.

The court will issue its order confirming that the automatic stay has been modified by the confirmed Chapter 13 Plan, which allows Movant to exercise its rights in the collateral.

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.
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> The Motion for Relief from the Automatic Stay filed by Americredit Financial Services, Inc. dba GM Financial ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the court confirms that the Automatic Stay in this

bankruptcy case has been modified with respect to the Movant and Movant's collateral, a 2017 Chevrolet Silverado 1500 with VIN ending in 1952 ("Vehicle"), as follows:

> "3.11. Bankruptcy stays.
>
> (a) Upon confirmation of the plan, the automatic stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1301(a) are . . . (2) modified to allow the [Movant] holder of a Class 4 secured claim to exercise its rights against its collateral [Vehicle] and any nondebtor in the event of a default under applicable law or contract; . . . ."

Plan ¶ 3.11, Dckt. 2; Confirmation Order, Dckt. 19.