

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 5, 2018, at 10:00 a.m.

1. [14-28953-E-7](#) **JOHN/MARY ANDERSON** **MOTION FOR RELIEF FROM**
APN-1 **Dale Orthner** **AUTOMATIC STAY**
SANTANDER CONSUMER USA, INC. **2-28-18 [103]**
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—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 7 Trustee, and Office of the United States Trustee on February 28, 2018. By the court's calculation, 36 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 Motion for Relief from the Automatic Stay is denied without prejudice.

Santander Consumer USA Inc. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2013 Nissan Juke, VIN ending in 3033 ("Vehicle"). The moving party has provided the Declaration of Erica Engel to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by John Anderson and Mary Anderson ("Debtor").

The Erica Engel Declaration attempts to provide testimony based upon information and belief that Debtor has not made three post-discharge payments, with a total of \$758.61 in post-discharge payments

past due. The Declaration indicates that before the hearing, another payment will become due. However, competent testimony must be that based on the witness' personal knowledge, not merely what he or she has been informed by someone else or the "belief" they desire because it means their side wins. Fed. R. Evid. 601, 602.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

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 \$7,107.97, as stated in the Erica Engel Declaration, while the value of the Vehicle is determined to be \$7,975.00, as established by the NADA Valuation Report.

CHAPTER 7 TRUSTEE'S STATE OF NON-OPPOSITION

Douglas Whatley ("the Chapter 7 Trustee") filed a Statement of Non-Opposition on March 3, 2018.

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).

Debtor was granted a discharge in this case on September 17, 2017. Dckt. 95. Granting of a discharge to an individual in a Chapter 7 case terminates the automatic stay as to that debtor by operation of law, replacing it with the discharge injunction. *See* 11 U.S.C. §§ 362(c)(2)(C), 524(a)(2).

Further, where the debtor is an individual, the automatic stay will fail with respect to personal property of the estate or debtor that secures in whole or in part a claim where the debtor fails to file a timely statement of intention, pursuant to 11 U.S.C. § 521(a)(2), regarding the personal property or indicating that debtor will either surrender such personal property or retain it. *See* 11 U.S.C. § 362(h)(1). Should the debtor choose to retain such personal property, an agreement of the kind specified in section 524(c) must be entered into. *Id.*

However, the stay will also terminate where a trustee has not filed a motion within the time specified by section 521(a)(2), and the court has not determined that the personal property is of consequential value or benefit to the estate. *See* 11 U.S.C. § 362(h)(2). There being no automatic stay, the Motion is denied as moot as to Debtor.

The Erica Engel Declaration that she is providing testimony under penalty of perjury based on her “personal knowledge of the Matters stated in this Declaration except as to those state on **information and belief** and as to those matters, I believe them to be true and correct.” Dckt. 105. Ms. Engel’s admission that not all of her declaration is based upon personal knowledge testimony as required by Federal Rule of Evidence 602 calls into question almost all of the statements in her declaration. The court reviews the declaration as to what is presented as personal knowledge testimony and as to what is presented as inadmissible testimony based upon information and belief.

Ms. Engel testifies that she is a Bankruptcy Specialist of Movant’s and that she is a custodian or keeper of business records. She also provides personal knowledge testimony that the Vehicle is valued at \$7,975.00 based upon the NADA Valuation Report that she pulled. Finally, she provides personal knowledge testimony that the outstanding balance for the claim secured by the Vehicle is \$7,107.97. Ms. Engel has essentially testified as to the Vehicle’s value and what is owed in principal.

As to information and belief, Ms. Engel presents that Debtor entered into a contract to purchase the Vehicle, that Debtor received a discharge in this case, that Debtor is delinquent on the contractual payments, and that Movant believes Debtor has defaulted on the contract. None of those presentations are admissible.

The only evidence that is admissible for the court’s review of this Motion is that the Vehicle is valued at \$7,975.00 and that the claim against it is in the amount of \$7,107.97. The court does not have admissible personal knowledge testimony about who owes the amount and about whether that party has defaulted on the underlying contract.

Without proper personal knowledge testimony from a competent witness, pursuant to Federal Rules of Evidence 601 & 602, there is no support for the allegations in the Motion. 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 Santander 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.

IT IS FURTHER ORDERED that John Anderson and Mary Anderson (“Debtor”) having received a discharge, the automatic stay has terminated as to any acts other than as to property of the bankruptcy estate pursuant to 11 U.S.C. § 362(c)(2)(C) and as to property of the bankruptcy estate pursuant to 11 U.S.C. § 362(h).