

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

April 23, 2015 at 9:30 a.m.

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1. [13-27672-E-7](#) DAVID FLORK MOTION FOR RELIEF FROM
RVD-1 Stephen N. Murphy AUTOMATIC STAY
3-4-15 [[33](#)]
GEORGE MERRILL 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 7 Trustee on March 4, 2015. By the court's calculation, 50 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.

**The Motion for Relief From the Automatic Stay is continued to ~~XXXXXX~~
on ~~XXXXXX~~, 2015.**

George Merrill ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 7022 Leisure Town Road, Vacaville, Solano County, California (the "Property"). Movant has provided the

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Declaration of George Merrill to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The George Merrill Declaration states that Movant has a secured claim against the Property initially evidenced by a Right to Attach Order recorded May 16, 2012 as Document No. 201200046875 in the Official Records of the Solano Recorder, and subsequently perfected by the recording of an Abstract of Judgment on September 25, 2012 as Document No. 201200096920 of the Official Records of the Solano County Recorder. The Judgment, as entered, is in the amount of \$690,835.92 as of September 19, 2012. From that time until February 28, 2015, interest has accrued at the rate of 10% per annum in the amount of \$168,828.94 for a total owed on the Judgment of \$859,664.86. Debtor has never made a payment towards the Judgment and as of March 1, 2015, the outstanding balance due was \$859,664.86.

IMPROPER FILINGS OF PLEADINGS

The Movant is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The Movant filed the notice, points and authorities, declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Local Bankruptcy Rule 9004(a) and Revised Guidelines for the Preparation of Documents, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rules 9004(a), 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court. (Some running hundreds of pages.) It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents which can then be used by the court.

However, the court waives these defects due to the unique facts of the instant case. The Movant, though, should not rely on the court's waiver in the future for failing to follow the Local Rules for proper filing and pleading.

OPPOSITION

Opposition has been filed by David Flork ("Debtor") asserting Movant's lien is unenforceable, as it was obtained as a result of a Defective Order.

Debtor claims that Movant incorrectly represented that real property

located at 7022 Leisure Town Road, Vacaville, was not exempt from attachment. At the time of the entry of the order, Debtor was entitled to an automatic exemption provided under C.C.P. § 704.730 because the Subject Property was Debtor's principal residence and Debtor is a disabled veteran.

DISCUSSION

Though the Motion could properly be denied without prejudice due to the court not having determined the extent to which Creditor's lien may be avoided, if any, pursuant to 11 U.S.C. Section 522(f), to save Creditor the cost and expense of having to file a new Motion, the court continues the hearing on this Motion to the date and time of the Evidentiary Hearing Scheduling Conference on the contested motion to avoid lien (DCN: SNM-1). Creditor's election to have the matter continued, rather than demanding that the order (denying the Motion) be issued at this hearing is deemed Creditor's consent to the continuation of the hearing for purposes of 11 U.S.C. § 362(e).

Additionally, even in the absence of Creditor's consent, good cause exists to continue the hearing until the court, as a matter of bankruptcy law, determines the extent to which Creditor's judicial lien may be avoided, if any, pursuant to 11 U.S.C. § 522(f).

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 George Merrill ("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 is continued to ~~xxxxxx~~ on ~~xxxxxxx~~, 2015.

2. [14-29284-E-7](#) CHARLES MILLS
APN-1 Lucas B. Garcia

MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-23-15 [[224](#)]

BMW BANK OF NORTH AMERICA
VS.

Final Ruling: No appearance at the April 23, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 24, 2015. By the court's calculation, 30 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). 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 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.

Charles Mills ("Debtor") commenced this bankruptcy case on September 17, 2014. BMW Bank of North America, a Utah Industrial Bank and wholly owned subsidiary of BMW Financial Services NA, LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2011 Maserati GranTurismo, VIN ending in 8792 (the "Vehicle"). The moving party has provided the Declaration of Debbie Beraducci to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Beraducci Declaration provides testimony that Debtor has not made 6 post-petition payments, with a total of \$13,594.68 in post-petition payments past due. The Declaration also provides evidence that there is 1 pre-petition payment in default, with a pre-petition arrearage of \$22,657.80.

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 \$112,101.32, as stated in the Beraducci Declaration, while the value of the Vehicle is determined to be \$56,393.00, as stated in Schedules B and D filed by Debtor.

Movant has also provided a copy of the Kelly Blue Book 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).

OPPOSITION TO MOTION

Debtor has not filed an opposition to the instant motion.

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 exists for terminating the automatic stay since the debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow BMW Bank of North America, a Utah Industrial Bank and wholly owned subsidiary of BMW Financial Services NA, LLC, 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.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not 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 BMW Bank of North America, a Utah Industrial Bank and wholly owned subsidiary of BMW Financial Services NA, 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 2011 Maserati GranTurismo ("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 (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.

No other or additional relief is granted.