

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

May 7, 2019 at 1:30 p.m.

1. [18-23227-E-13](#) **KIMBERLI HECK AND DAVID** **MOTION FOR RELIEF FROM**
[JHW-1](#) **HECK, JR.** **AUTOMATIC STAY**
 Paul Bains **4-3-19 [45]**

CAB WEST, LLC VS.

Final Ruling: No appearance at the May 7, 2019, hearing is required.

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 April 3, 2019. By the court’s calculation, 34 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). 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.

Cab West, LLC, (“Movant”) filed this Motion seeking relief from the automatic stay as to Kimberli Beth Heck and David Keith Heck, Jr.’s (“Debtor”) personal property identified as a 2016 Ford

Explorer, VIN ending in 3041 (the “Vehicle”). Motion, Dckt. 45.

The Motion states with particularity the following grounds:

1. Debtor’s Chapter 13 plan provides for direct payments to Movant.
2. Movant is the lessor for the Vehicle. The lease agreement between Debtor and Movant matured on March 3, 2019. While the lease agreement provided for a purchase option (the amount being \$25,815.20), Debtor has not exercised that option or returned the Vehicle.
3. Movant would exercise its rights under the lease agreement but for the automatic stay.
4. The court should granted waiver of the 14 day stay because the Vehicle is a rapidly depreciating asset.

In support of the Motion Movant filed the Declaration of Kristina Mowers. Dckt. 47. Movant also filed as Exhibits a copy of the lease agreement, a certificate of title (reflecting Movant is the owner of the Vehicle), and a copy of the Debtor’s Confirmed Plan. Exhibits A-C, Dckt. 49.

Assumption of Movant’s Lease Under the Confirmed Chapter 13 Plan

The Confirmed Chapter 13 Plan, a modified plan, did not provide for Movant’s claim. However, the Order Confirming the plan provided that Movant’s lease agreement would be assumed pursuant to section 4.02 of the Plan. Order, Dckt. 44).

Section 3.11 of the Plan modifies the automatic stay as follows:

(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 (1) terminated to allow the holder of a Class 3 secured claim to exercise its rights against its collateral; (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; and (3) modified to allow the nondebtor party to an unexpired lease that is in default and rejected in section 4 of this plan to obtain possession of leased property, to dispose of it under applicable law, and to exercise its rights against any nondebtor.

Modified Plan, Dckt. 30.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on April 22, 2019. Dckt. 52. Trustee does not oppose the Motion, and notes relief is not necessary where the Confirmed Plan already provides relief. The Trustee's basis for this assertion is not expressly stated. (The court addresses this below.)

DISCUSSION

Relief From Automatic Stay

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).

Here, Debtor's only remaining interest in the Vehicle is a purchase option which Debtor has elected not to exercise. Debtor did not file any response or opposition to the present Motion. Therefore, good cause exists for relief from the automatic stay.

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.

Modification of Stay Under The Chapter 13 Plan

Trustee states that the Movant “may not” need stay relief where the plan already provides for relief from the stay. In saying “may,” the statement is pregnant with the possibility that relief “may” be needed.

Section 3.11 of the Plan modifies the automatic stay as follows:

(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** (1) terminated to allow the holder of a Class 3 secured claim to exercise its rights against its collateral; **(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; and **(3) modified to allow the nondebtor party to an unexpired lease that is in default and rejected in section 4 of this plan to obtain possession of leased property, to dispose of it under applicable law, and to exercise its rights against any nondebtor.**

Modified Plan, Dckt. 30(emphasis added).

Here, Movant’s claim is based on a “lease” with a “purchase” option. Such may be a “secured claim” rather than merely a lease where Debtor does not have any “ownership” interests. If so, then it is “possible” that the stay “may” have been modified for such possible “secured claim” that “may” exist.

Many creditors (appropriately) recognize that discretion is the better part of valor and obtain an order confirming that the stay has been modified, rather than run the risk of there being a dispute as to such determination. Even if it appears “clear” from the plan that the stay was modified, title insurance companies and other third parties that a creditor may use to liquidate collateral may require the order from the confirming that the stay has been modified.

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. Movant argues that relief is warranted because the Vehicle is a rapidly depreciating asset.

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.

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 to Confirm Absence of the Automatic Stay filed by Cab West, 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 2016 Ford Explorer, VIN ending in 3041 (“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.