

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge
Sacramento, California

May 10, 2016 at 1:30 p.m.

1. **16-20361-E-13 DANIEL MASSEY**
APN-2 Corrina Roy

**CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY**

3-21-16 [21]

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 13 Trustee, and Office of the United States Trustee on March 21, 2016. 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). 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. 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.

Daniel Massey ("Debtor") commenced this bankruptcy case on January 22, 2016. BMW Financial Services N.A., LLC, service provider for Financial Services Vehicle Trust ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2014 BMW 428xi, VIN ending in 5484 (the "Vehicle"). The moving party has provided the Declaration of Christine Hickman to introduce evidence to authenticate the documents upon which it bases the claim and the

May 10, 2016 at 1:30 p.m.

- Page 1 of 8 -

obligation owed by the Debtor.

The Hickman Declaration provides testimony that Debtor has not made 1 post-petition payments, with a total of \$586.83 in post-petition payments past due. The Declaration also provides evidence that there are 3 pre-petition payments in default, with a pre-petition arrearage of \$1,543.13.

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 \$39,337.53, as stated in the Hickman Declaration, while the value of the Vehicle is determined to be \$32,248.00, as stated in Schedules B and D filed by Debtor.

OPPOSITION TO MOTION

Debtor filed an opposition on April 12, 2016. Dckt. 31. Debtor states that the post-petition default resulted from that payment being mistakenly included in Debtor's Plan payment, which had not provided for post-petition payments. Debtor states that he has cured his post-petition arrears at the time of filing this opposition. Debtor states further the that pre-petition arrears are being provided for through the Chapter 13 Plan.

TRUSTEE'S RESPONSE TO MOTION

On March 30, 2016, David Cusick, the Chapter 13 Trustee, filed a response. Dckt. 28. The Trustee states that Debtor has been paying into his Plan, and that the Plan provides for Movant's pre-petition arrears.

The Debtor is current under the proposed plan. The current proposed plan lists creditor under Section 3.02 - Executory Contracts and Unexpired Leases, and includes pre-petition arrears of \$1,278.00 with a monthly dividend of \$58.09. The Proof of Claim No 1 filed by Movant lists \$14,775.09 with \$1,278.00 in lease arrears.

APRIL 26, 2016 HEARING

At the hearing, the court continued the hearing to 1:30 p.m. on May 10, 2016. Dckt. 46.

RULING

No supplemental papers have been filled in connection with the instant Motion.

The Movant's arguments are well-taken. Debtor states that post-petition arrears have been accounted for, but Debtor has not supported that assertion by signed statement under penalty of perjury. Debtor has submitted no other evidence showing that he has become current. Furthermore, Debtor is a lessee here, and therefore has a mere possessory interest. 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).

The court shall issue an order terminating and vacating the automatic stay to allow BMW Financial Services N.A., LLC, service provider for Financial Services Vehicle Trust , 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.

Though requested in the Motion, Movant has not stated either a contractual or statutory basis for the award of attorneys' fees in connection with this Motion. Movant is not awarded any attorneys' fees.

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 Financial Services N.A., LLC, service provider for Financial Services Vehicle Trust ("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 2014 BMW 428xi, VIN ending in 5484 ("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.

IT IS FURTHER ORDERED that the Movant party having established that the value of the Vehicle subject to its lien not having a value greater than the obligation secured, the moving party is not awarded attorneys' fees as part of Movant's secured claim.

No other or additional relief is granted.

No Tentative Ruling: The Motion to Employ 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, creditors, parties requesting special notice, and Office of the United States Trustee on April 7, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Employ 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 and other parties in interest are entered.

The Motion to Employ is ~~xxxxx~~.

Chapter 7 Trustee, John Roberts, seeks to employ Special Litigation Counsel Nina Salarno, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Counsel to assist the Trustee in the representation of the estate's interest in the divorce action pending in state court.

The Trustee argues that Counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present divorce action. The Trustee states that Ms. Salarno has represented the Debtor in the divorce action only.

Ms. Salarno testifies that she has only represented the Debtor in the divorce proceeding and has not represented any other party in connection with the Debtor. Ms. Salarno declares that she holds no claims against Debtor or

Captain Enterprises, LLC at this time. Ms. Salarno states that Captain Enterprises, LLC advanced the fees and costs incurred in the divorce action, although Ms. Salarno only represented the Debtor. Ms. Salarno testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys, outside of the representation of the Debtor in the divorce action.

The Trustee's Motion requesting the following relief:

WHEREFORE, Trustee prays that his employment of Salarno as set forth herein be approved as follows:

- i. As counsel for the Trustee pursuant to 11 U.S.C. §§ 330 and 503(b)(2) in the Pettengill case, and
- ii. As an administrative expense claimant in the Lazoutkine case on account of professional services rendered by an attorney for valuable services rendered in that estate pursuant to 11 U.S.C. § 503(B)(4) [sic];
- iii. At the rate of \$400 per hour, to be offset against a \$25,000 retainer (the "Retainer") which will be advanced and supplemented by Jenny Pettengill from her personal, exempt funds which are not property of her bankruptcy estate;
- iv. With the caveats that:
 1. Salarno may not take any instruction from Ms. Pettengill as that instruction may relate to the contemplated litigation, and
 2. Ms. Pettengill shall be subrogated to Salarno's position as an administrative priority expense creditor to the extent Salarno's fees and costs have already been allowed by this Court and advanced by Pettengill from personal, exempt funds which are not property of her bankruptcy estate.

Dckt. 245.

APPLICABLE LAW

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 327 also provides for special provisions if the attorney whose employment being sought previously represented the Debtor:

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including. . .

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under

section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

DISCUSSION

The Trustee does not attach the employment agreement for the court and other parties in interest to review, but provides a summary of terms in the Motion. The Motion gives substantial background as to the factually and legally intensive nature of the case. However, most of what is discussed goes to the protracted "civil" dissolution fight between Debtor and ex-spouse, but not on the issue of whether the property was community property or owned by Corrigan Finance.

The Trustee first instructs that Salerno will be approved as counsel pursuant to 11 U.S.C. § 330 and § 503(b)(2). First, 11 U.S.C. § 330 is not a provision for authorizing to employ a professional, but only provides the basis for allowing compensation to a professional previously authorized to be employed. It appears that the Trustee references this section to indicate that whatever fees Salerno will ultimately be paid must first be approved by the court. The Motion then directs the court to 11 U.S.C. § 503(b)(2) and (4), which state that fees allowed pursuant to 11 U.S.C. § 330 are an administrative expense.

Next, Debtor will provide a \$25,000.00 retainer for Salerno, and that Salerno be authorized to draw on the retainer without any approval of fees pursuant to 11 U.S.C. § 331 for interim fees.

Third, that any administrative expense of Debtor will be subordinated to Salerno's administrative expense.

Fourth, the court must lift the automatic stay and the Trustee prosecute the determination of what is property of the estate in the family law court. (Where the court notes that Debtor and Salerno have labored since 2011.)

Fifth, the court pre-approves an hourly rate of \$400.00 for Salerno.

Sixth, Salerno be granted an administrative expense in priority over all other administrative expenses from the proceeds of any property which is determined to be property of the bankruptcy estate through litigation in which Salerno represents the Trustee. However, the Trustee offers no legal basis for the court rewriting the administrative priority expenses for Salerno.

In "selling" the court on authorizing the employment, the Trustee argues that because of the "complexity" of the litigation (to determine whether

the property is property of the bankruptcy estate and the bankruptcy estate is administratively insolvent, the Trustee has not been successful in engaging any other attorney to represent the Trustee on a contingent fee basis.

The Trustee and proposed counsel for Trustee shall address at the hearing the great complexity of this litigation to determine the estate's interest in this property. In some respects, this litigation can be as "simple" as a post-judgment enforcement action by a debt collector who has obtained a judgment against only one spouse. The collector seeks to enforce the judgment against property for which title is held only in the name of the non-debtor spouse and the post-judgment proceedings are limited to determine whether the property is actually community property. There are none of the other dissolution, support, contempt, protective order, income disparity, sanction disputes which pervade State Court family law dissolution actions.

While many of the above mandatory employment terms stated to the court are within employment pursuant to 11 U.S.C. § 327, the Trustee has not provided the court with a basis for entering an order mandating that the ownership rights and interests of the estate will be litigated in the family law court, in conflict with the prior order of this court.

The Motion also does not address why litigation of the estate's rights and interests in the property are more efficiently and cost effectively litigated in the family law proceedings with all of the other dissolution issues rather than in this court - as previously stipulated by the Trustee.

Additionally, while making the statement that the Trustee could not engage another attorney, the court has not been provided with a summary of the efforts of the Trustee, and whether the Trustee dictated that any such representation must be in the State Court Family Law division rather than this court.

MAY 5, 2016 HEARING

At the hearing, Trustee's counsel and the proposed special counsel requested a continuance so that the final terms, in light of the issues raised, could be addressed and the employment consummated. The court continued the hearing to 1:30 p.m. on May 10, 2016. Dckt. 264.

MAY 10, 2016 HEARING

To date, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, **xxxxxx**