UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

May 11, 2017, at 10:00 a.m.

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1. **16-21305-E-7** **RODERICK/ROSEMARIE TAPNIO** **MOTION FOR RELIEF FROM**
RAS-1 **Peter Macaluso** **AUTOMATIC STAY**
4-13-17 [185]

WELLS FARGO BANK, N.A. VS.

APPEARANCE OF SEAN FERRY, ESQ., COUNSEL FOR WELLS FARGO BANK, N.A., TRUSTEE REQUIRED AT MAY 11, 2017 HEARING

TELEPHONIC APPEARANCE PERMITTED

FAILURE OF COUNSEL TO APPEAR WILL RESULT IN MOTION BEING DENIED

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 April 12, 2017. By the court's calculation, 29 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 granted.

Roderick Tapnio and Rosemarie Tapnio ("Debtor") commenced this bankruptcy case on March 2, 2016. Wells Fargo Bank, N.A., as Trustee for IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2005-2 ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 518 Kinsale Court, Vacaville, California ("Property"). Movant has provided the Declaration of Timeka Motlow to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Motlow Declaration notes that Debtor intends to surrender the Property to Movant, as listed on the Statement of Intentions.

Review of Motion and Supporting Evidence

The Motion begins with a request for relief from the automatic stay pursuant to 11 U.S.C. § 362(d). In the concluding paragraph to the Motion, reference is made to 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 362(d)(2). The grounds stated with particularity (FED. R. BANKR. P. 9013) are:

A. Creditor has a claim secured by the Property.

B. The amount of the claim is $475,090.41.

C. Based on Debtor's statement of value on Schedule A, the Property has a value of $449,708.00.

D. Relief pursuant to 11 U.S.C. § 362(d)(1) is proper because:

1. "[n]amely the lack of adequate protection for [Movant's] interest in the above stated collateral."

No grounds are stated with particularity as to the grounds asserted for the lack of adequate protection, merely the legal conclusion that there would be a lack of adequate protection.

E. Relief pursuant to 11 U.S.C. § 362(d)(2) because:

1. "[t]he collateral is unnecessary to an effective reorganization of the Debtor's assets."

As counsel for Movant knows, there are two prongs to relief pursuant to 11 U.S.C. § 362(d)(2). The second is that the property is not necessary for an effective reorganization (for which the person opposing the motion bears the burden of proof, 11 U.S.C. § 362(g)). However, the first prong is that there is no equity in the property for the debtor or the bankruptcy estate. On its face, the statement of the "grounds" for relief ignores that element. While it can be stated, "but judge, we allege the value of the property and amount of the secured claim, so you do the math, you pull that together, and you interlineate in paragraph 12 of our

Motion that we really intend to state that in the Motion." Such a belief that the court will reconstruct a motion to state grounds can lead to disastrous results, at least for such a movant.

F. Debtor's Statement of Intention for this claim and the Property is that the Property is to be surrendered.

G. The fourteen-day stay should be waived in light of Debtor not having motivation to care for the Property once relief from the stay is granted.

H. Movant has incurred costs and attorneys fees in bringing this Motion, and should be awarded such fees and costs.

The Motion does not state with particularity the contractual or statutory grounds for the right to such attorney's fees. No amount of attorney's fees is requested in the Motion. No evidence of the attorney's fees incurred is provided. Again, counsel may argue, "well, everyone knows that a standard mortgage and deed of trust contains an attorney's fees clause, so judge, you go through and read out exhibits, you find the clauses, you state the clause for our client, and then you rule on the grounds that you state for our client." While such offloading of work to the court may make it cheaper for Movant to conduct its legal proceedings, (1) the taxpayers do not pay for Movant's legal services by providing free judicial staff as associate attorneys for parties, and (2) it is not proper for the court to advocate for one party over the other.

See Motion, Dckt. 185.

Movant has provided the Declaration of Timeka J. Motlow in support of the Motion. Dckt. 188. This Declaration is to provide the necessary testimony and authentication of exhibits (to the extent that they are not properly self-authenticating as provided in FED. R. EVID. 901, 902).

Ms. Timeka testified under penalty of perjury to the following:

A. She is employed as a "Contract Management Coordinator" (an undefined term) by Ocwen Loan Servicing, LLC, which is the loan servicer for Movant.

B. In the course of her employment, she has personal knowledge with the records maintained by Ocwen Loan Servicing, LLC.

C. "The information in this declaration is taken from Ocwen Loan Servicing, LLC's business records regarding the Loan [secured claim of Movant]."

Debtor testifies that she has no personal knowledge of what she is testifying to, but provides the court with information from Ocwen Loan Servicing, LLC's business records.

D. She then testifies that Debtor make hand delivered a note, as well as the deed of trust that secures it.

At this juncture, the court notes that no basis is shown for Ocwen Loan Servicing, LLC having business records that go back to the initiation of the loan. Rather, it appears that Ms. Motlow is merely reciting what she is reading on a document provided to Ocwen Loan Servicing, LLC by Movant. No basis has been given for Ms. Motlow providing "testimony" under penalty of perjury as to "facts" that date back to 2005 (the date on the Note upon which the secured claim is based).

E. Ms. Motlow then provides the court with her "legal opinion" that Debtor is obligated on the Note and Deed of Trust.

No basis is shown for Ms. Motlow providing the court with "expert testimony" as to California law or why such "expert testimony" is proper.

See Declaration, Dckt. 188.

Conspicuously absent from the Declaration is any testimony about the obligation, what Ocwen Loan Servicing, LLC computes the outstanding claim to be, or the defaults in payments as shown in the books and records of Ocwen Loan Servicing, LLC. The Declaration does not authenticate any of the exhibits that have been filed with the Motion. In substance, the Declaration provides little, if any, useful testimony for the Motion before the court. Rather, it appears that this is merely a "stock declaration," to be used and signed by whatever "placeholder" person is whipping out "testimony" for Movant.

RULING

From the evidence provided to the court, and only for purposes of this Motion for Relief, the value of the Property is determined to be $401,000.00, as stated in Schedule A. Dckt. 167. No evidence is presented as to the amount of the debt secured by the Property. Merely making an allegation in a motion is not evidence. Given how easy it is for a creditor, including the loan servicer responsible for accurately handling that information, to state what is owed, the absence of such testimony is very concerning to the court.

There being no evidence as to the amount of the debt secured by the claim, Movant has not provided the court with grounds for relief pursuant to 11 U.S.C. § 362(d)(2). Such relief is denied.

That leaves relief "for cause" pursuant to 11 U.S.C. § 362(d)(1). 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).

While stating the conclusion that Movant's interests in the Property are not adequately protected, Movant does not allege any grounds upon which that conclusion is based—in the Motion (FED. R. BANKR. P. 9013). Counsel may argue, "judge, if you read the points and authorities (not the declaration, since it says very, very little), then the exhibits, and then the rest of the documents filed in this bankruptcy case, you probably can fabricate for us the grounds you think work for cause." Such a contention would again miss the mark as to not only what is required under the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules, but also the role of the federal court in adjudicating matters before it.

The one slim reed that is asserted in the Motion as grounds for relief from the stay for cause is that Debtor states the intention that the Property is to be surrendered. Dckt. 144 at 2. Neither the Debtor nor the Trustee have risen in opposition to the Motion or disputed this intention that Movant should be allowed to resort to for its collateral.

The court determines that cause exists for terminating the automatic stay because Debtor intends to surrender the Property. Dckt. 144, Statement of Intention; 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Denial of Request For Attorneys' Fees

Movant has failed to provide the court with any legal basis for or evidence of any legal fees to be awarded. While it could have been simply stated and the evidence provided, it has not been. It is true that Movant can seek fees by a post-judgment motion (FED. R. BANK. P. 7054 and 9014), but most likely, the costs of filing a second motion will outweigh what could have been obtained through this Motion. If a second motion is filed and fees are requested for that second motion, the court will have to determine if fees for two motions were necessary.

Granting Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant notes that Debtor will have minimal motivation to insure, preserve, or protect the collateral if the automatic stay is terminated. Additionally, Debtor intends to surrender the Property.

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 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 Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

No other or additional relief is granted by the court.

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 Wells Fargo Bank, N.A., as Trustee for IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2005-2 ("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 automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Wells Fargo Bank, N.A., as Trustee for IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2005-2, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the Property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the real property commonly known as 518 Kinsale Court, Vacaville, California.

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.

No other or additional relief is granted.

2. **16-21607-E-7** **NICOLE HARRISON** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
TGM-1 **Mohammad Mokarram** **4-11-17 [72]**

TOYOTA MOTOR CREDIT CORPORATION VS.

Final Ruling: No appearance at the May 11, 2017 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, Chapter 7 Trustee, and Office of the United States Trustee on April 11, 2017. 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). 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.

Nicole Harrison ("Debtor") commenced this bankruptcy case on March 16, 2016. Toyota Motor Credit Corporation ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2013 Toyota Corolla, VIN ending in 9581 ("Vehicle"). The moving party has provided the Declaration of Cheryl Nishimura to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Nishimura Declaration provides testimony that Debtor has not made ten post-petition payments, with a total of $4,781.38 in post-petition payments past due.

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).

The Nishimura Declaration also seeks to introduce evidence establishing the value of the asset. Though the NADA Valuation Report is attached as an Exhibit, it is not properly authenticated.

Though the court will *sua sponte* take notice that the NADA Valuation Report can be within the "market reports and similar commercial publications" exception to the hearsay rule (Federal Rule of Evidence 803(17)), it does not resolve the authentication requirement. FED. R. EVID. 901. In this case, and because no opposition has been asserted by the Debtor, the court will presume the Declaration of Cheryl Nishimura to be that she obtained the NADA Valuation Report and is providing that to the court under penalty of perjury. Creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

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 $17,667.63, as stated in the Nishimura Declaration, while the value of the Vehicle is determined to be $9,850.00, as stated in the NADA Valuation Report, which is less than the $11,941.00 listed on Schedule B (filed on March 16, 2016). Exhibit C, Dckt. 76.

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). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432. Additionally, there is cause to grant relief from the automatic stay because Debtor has declared her intention to surrender the Vehicle. Dckt. 53.

Debtor was granted a discharge in this case on April 18, 2017. Dckt. 79. 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). There being no automatic stay, the Motion is denied as moot as to Debtor. The Motion is granted as to the Estate.

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.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States

Supreme Court. With no grounds for such relief specified, the court usually will not grant additional relief merely stated in the prayer.

In this case, however, Debtor has filed a Statement of Intention indicating that the Vehicle will be surrendered, which creates cause for the court to grant relief from the fourteen-day stay of enforcement.

REQUEST FOR PROSPECTIVE INJUNCTIVE RELIEF

Movant makes an **additional request stated in the prayer**, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. Though stated in the prayer, no grounds are stated in the Motion for grounds for such relief from the stay. The Motion presumes that conversion of the bankruptcy case will be reimposed if this case were converted to one under another Chapter.

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(1)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, the legal points and authorities for such heretofore unknown nascent stay is necessary.

As noted by another bankruptcy judge, such (unsupported by any grounds or legal authority) for relief of a future stay in the same bankruptcy case:

> [A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.
>
> Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

In re Van Ness, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the "silly" request for unnecessary relief may well be ultimately deemed an admission by Toyota Motor Credit Corporation and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Toyota Motor Credit Corporation and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

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 Toyota Motor Credit Corporation ("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 2013 Toyota Corolla ("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 to the extent the Motion seeks relief from the automatic stay as to Nicole Harrison ("Debtor"), the discharge having been granted in this case, the Motion is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C) as to Debtor.
>
> **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.
>
> No other or additional relief is granted.