

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

May 18, 2017, at 10:00 a.m.

1. **17-90240-E-7** **LETICIA MORENO** **MOTION FOR RELIEF FROM**
VVF-1 **Martha Lynn Passalaqua** **AUTOMATIC STAY AND/OR MOTION**
 FOR ADEQUATE PROTECTION
 4-20-17 [16]

**AMERICAN HONDA FINANCE
CORPORATION VS.**

Final Ruling: No appearance at the May 18, 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, Debtor’s Attorney, Chapter 7 Trustee, and Office of the United States Trustee on April 20, 2017. By the court’s calculation, 28 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.

Leticia Moreno (“Debtor”) commenced this bankruptcy case on March 29, 2017. American Honda Finance Corporation (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2009 Honda Accord, VIN ending in 8059 (“Vehicle”). The moving party has provided the Declaration of Michael Tennison to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Debtor.

The Tennison Declaration provides testimony that Debtor has not made one post-petition payments, with a total of \$420.11 in post-petition payments past due. The Declaration also provides evidence that 0.42 pre-petition payments in default, with a pre-petition arrearage of \$180.55.

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 \$8,185.73, as stated in the Tennison Declaration, while the value of the Vehicle is determined to be \$7,040.00, as stated in Amended Schedule B filed by Debtor, which is less than the retail value (\$10,350.00) as stated on the NADA Valuation Report, although the court notes that Movant uses the average trade-in value of \$7,025.00. *See* Dckt. 15.

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.

A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). 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 Property is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (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 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.

Requested Relief from the 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 and pleads the following grounds in the Motion:

- A. The eroding nature of Movant's collateral due to decline in value of the Vehicle;
- B. The delinquency that remains on the loan secured by the Vehicle, and there being no indication that Debtor will cure the delinquency;
- C. There is no equity in the Vehicle; and
- D. There is no evidence that the Vehicle is necessary for an effective reorganization.

The court has already granted relief from the automatic stay for Movant because of the uncured delinquency (11 U.S.C. § 362(d)(1)) and because of both there being no equity in the Vehicle and it not being necessary for reorganization (11 U.S.C. § 362(d)(2)).

Though the court does not have evidence of there being any significant decline in the value of the Vehicle during the fourteen-day stay of enforcement, the court is satisfied that cause has been shown to waive the stay because of the delinquency on the Vehicle, there is no equity in the Vehicle, and the Debtor not coming forward to show that she intends to keep the Vehicle by paying Movant.

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 also 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 American Honda Finance 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 2009 Honda Accord ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially

JANUARY 26, 2017 HEARING

At the hearing, the court authorized the use of cash collateral for the period of February 1, 2017, through May 31, 2017. Dckt. 478. Additionally, the court continued the hearing to May 18, 2017, at 10:30 a.m. for the court to continue authorizing the further use of cash collateral. On or before April 18, 2017, Debtor in Possession was ordered to file a Supplement to the Motion, if any, in support of authorization for the further use of cash collateral, along with a Notice of Continued Hearing. Opposition to such further use, if any, was ordered to be filed and served on or before May 2, 2017. Dckt. 485.

SIXTH SUPPLEMENT TO MOTION TO USE CASH COLLATERAL

Debtor in Possession filed a Sixth Supplement to Motion to Use Cash Collateral on April 18, 2017. Dckt. 563. Debtor in Possession holds fee title to the following property:

PROPERTY LOCATION	TYPE OF RENTAL
97 W. Canal Drive	Single Family Residential

The following chart describes the encumbrances:

RENTAL	CREDITOR	RECORDATION DATE	ASSIGNMENT OF RENTS?
97 W. Canal	Provident Credit Union/Deed of Trust	10/16/02	Yes
	Internal Revenue Service/ Tax liens	4/26/11;3/26/12	No

Debtor in Possession states that the use of cash collateral to pay ongoing expenses of the property will ensure that the property remains occupied and that there will be continued collection of rent from June 1, 2017, through September 30, 2017. Debtor in Possession proposes that the use of cash collateral be restricted to those expenses described below within a 20% variance for each category of expense and that the cash remaining after the payment of the same be retained by Debtor in Possession in the rental bank account.

97 W. Canal Drive

	<u>June</u>	<u>July</u>	<u>August</u>	<u>September</u>
<u>Revenue</u>				
Rent	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00
<u>Expenses</u>				

Insurance Premium	\$0.00	\$0.00	\$0.00	\$418.00
Management fees	\$90.00	\$90.00	\$90.00	\$90.00
Reserve for misc. maintenance exp.	\$200.00	\$200.00	\$100.00	\$200.00
Property taxes	\$0.00	\$0.00	\$0.00	\$0.00
Projected Surplus	\$710.00	\$710.00	\$810.00	\$292.00

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a Debtor in Possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a Debtor in Possession, the Debtor in Possession can use, sell, or sell property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or Debtor in Possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period

expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Debtor in Possession has shown that the use of cash collateral as proposed is in the best interest of estate and is in the ordinary course of business. The proposed budget provides for the continued upkeep of Debtor in Possession's rental property to ensure that the property can continue to attract and retain tenants for the continued income to the estate. Debtor in Possession has created a separate rental income account in which Debtor in Possession is depositing the rental income from the property, and the expenses are deducted from that account.

For purposes of this Motion, the use of cash collateral is authorized as to the property discussed.

Therefore, the court authorizes the use of cash collateral for the period of June 1, 2017, through September 30, 2017.

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 Authority to Use Cash Collateral filed by Debtor in Possession 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 granted, and the cash collateral may be used to pay the following expenses, granting Debtor in Possession a variance of 20% in any individual line item expense, plus the amount in maintenance reserve, as long as the total amount used does not exceed the total amount allowed:

97 W. Canal Drive

	<u>June</u>	<u>July</u>	<u>August</u>	<u>September</u>
<u>Revenue</u>				
Rent	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00
<u>Expenses</u>				
Insurance Premium	\$0.00	\$0.00	\$0.00	\$418.00
Management fees	\$90.00	\$90.00	\$90.00	\$90.00

Reserve for misc. maintenance exp.	\$200.00	\$200.00	\$100.00	\$200.00
Property taxes	\$0.00	\$0.00	\$0.00	\$0.00
Projected Surplus	\$710.00	\$710.00	\$810.00	\$292.00

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds of their collateral in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

IT IS FURTHER ORDERED that the hearing is continued to 10:30 a.m. on September 28, 2017, for the court to continue authorizing the further use of cash collateral. On or before August 28, 2017, Debtor in Possession shall file a Supplement to the Motion, if any, in support of authorization for the further use of cash collateral, along with a Notice of Continued Hearing. Opposition to such further use, if any, shall be filed and served on or before September 11, 2017.