UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 27, 2017, at 1:30 p.m.

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1. **17-22489-E-13** **EUGENE NIERI**
KR-1 **Mikalah Liviakis**

MOTION FOR RELIEF FROM AUTOMATIC STAY
6-6-17 [17]

LBS FINANCIAL CREDIT UNION
VS.

APPEARANCE OF KAREL ROCHA, ATTORNEY FOR MOVANT REQUIRED FOR JUNE 27, 2017 HEARING – TELEPHONIC APPEARANCE PERMITTED –

Failure of Counsel For Movant to Appear For June 27, 2017 Hearing Shall Result in the Hearing Be Continued, Counsel Ordered to Appear in Person With No Telephonic Appearance Permitted for the Continued Hearing

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 June 6, 2016. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of

these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Relief from the Automatic Stay is denied without prejudice as moot, the confirmed Chapter 13 Plan having modified the automatic stay with respect to Movant's collateral.

Eugene Nieri ("Debtor") commenced this bankruptcy case on April 14, 2017. LBS Financial Credit Union ("Movant") seeks relief from the automatic stay with respect to assets identified as a 2008 Mastercraft Boat X45 and 2007 Sport Trailer, VINs ending in G708 and 8192, respectively ("Vessel"). The moving party has provided the Declaration of Juan Flores to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Debtor.

The Juan Flores Declaration provides testimony that Debtor has not made one post-petition payments, with a total of $647.34in post-petition payments past due. The Declaration also provides evidence that there are five pre-petition payments in default, with a pre-petition arrearage of $3,236.70.

In the Motion, Movant states that relief is sought "pursuant to (unspecified) provisions of 11 U.S.C. Section 362." Motion, p. 1:24. The Motion then states:

A. Debtor "executed a Retail Installment and Sale Contract for a 2008 Mastercraft Boat X45, 2007 Sport Trailer, . . . ('Vessel') financed by LBS FINANCIAL CREDIT UNION."

B. "Debtor agreed to pay for the purchase the vessel in 120 monthly installment payments of $64 7.34 beginning December 15, 2011."

C. "Movant's legal ownership in the Vehicle is evidenced by a Certificate of Title."

D. "On or about November 25, 2016, the Debtor defaulted by failing to make the payment then due and owing under the Contract."

E. "Movant has elected to declare all unpaid sums immediately due and payable."

F. The "loan balance to Movant in the amount of $34,635.71."

G. "Debtor is in arrears for November 25,2016 through May 25,2017 payments and late charges in the total amount of $4,531.38, plus attorney fees and costs in the amount of $581.00 for a total amount of $5,112.38."

H. "According to the Chapter 13 Plan, Debtor does not propose to pay any payments to Movant through the Plan or outside the Plan. Instead, Debtor proposes to surrender the vessel to Movant."

Motion, Dckt. 17 at 1–2.

The above is the sum total of what is stated with particularity in the Motion (FED. R. BANKR. P. 9013) as the grounds upon which the "relief" is based. The Motion itself does not identify the specific relief. The next portion of this document is the "Points and Authorities." After the Points and Authorities is a "Conclusion," which states that Movant seeks relief from the automatic stay so that Movant may exercise its rights under the "Contract." The term "Contract" is not a defined term in the Motion, though one could assume that reference is being made to the Retail Installment and Sale Contract.

The Motion does not allege that cause exists to modify the automatic stay. The Motion does not allege that there is no equity in the vessel for Debtor or the bankruptcy estate. The Motion does state any value for the vessel. From the Motion, the court cannot identify what are the grounds with particularity upon which legal basis the requested relief is sought from the court.

Movant may be tempted to state that the court should just read the Points and Authorities that is rolled into the Motion because the Points and Authorities are where Movant really stated the grounds that are to be stated with particularity (FED. R. BANKR. P. 9013) in the motion itself. Creating a "Mothorities," a hybrid motion and points and authorities, which may also include exhibits and declarations, is not the practice in the Eastern District of California 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." Revised Guidelines for the Preparation of Documents § (III)(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 Rule 9004(a). Failure to comply 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. Often a pleading titled motion that is combined with a points and authorities often "hides" the grounds upon which the motion is based amid detailed citations, quotations, legal arguments, factual arguments, conjecture, and speculation.

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try to float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a different application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and applied uniformly.

Even looking at the Points and Authorities buried in the Motion, no reference is made to the legal basis for relief. The Points and Authorities does not cite the court to any legal authorities upon which requested relief may be granted.

The Motion (even including the points and authorities) does not state what relief is sought, other than a generic "exercise our rights under the Contract." Possibly those rights include suing Debtor personally for any deficiency. Those rights may include levying on Debtor's salary (which is property of the Chapter 13 bankruptcy estate). Those rights may include having the sheriff seize other property of the estate to enforce the personal judgment that Movant may be seeking to obtain.

To the extent Movant's counsel argues, "really judge, you can't figure out that you should just give us relief from the stay to obtain possession of our collateral, sell our collateral, and apply the sales proceeds to our secured claim," the court's response is: "If it is that simple, then you could have simply stated so in the simple motion seeking the simple relief."

TRUSTEE'S RESPONSE

Trustee filed a Response on June 13, 2017. Dckt. 23. The Trustee does not oppose the Motion for Relief regarding a 2008 Mastercraft X45 vessel, but the Trustee points out Creditor's Motion also includes a 2007 Sport Trailer that Debtor fails to include in the proposed plan or schedules.

Movant offers no reply to the Trustee's Response and does not address the existence of the trailer.

DISCUSSION

As addressed above, Movant fails to clearly state whether relief is sought pursuant to 11 U.S.C. § 362(d)(1)—for cause, including lack of adequate protection—or 11 U.S.C. § 362(d)(2)—lack of equity and not necessary for an effective reorganization.

With respect to the 11 U.S.C. § 362(d)(2) lack of equity grounds, Movant only gives the court half of the equation in stating that the outstanding debt secured by the boat and trailer is $34,635.71. No mention is made and no evidence is offered as to the value of the collateral. This may be because Debtor states under penalty of perjury on Amended Schedule A/B that the boat and trailer have a value of $45,000.00. Dckt. 26 at 4. That provides Movant with a twenty-nine percent (29%) equity cushion. It appears that there is substantial equity in the boat and trailer for the bankruptcy estate.

Moving to the issue of adequate protection, a 29% equity cushion would appear to "adequately protect" Movant at this point of the case. *United Savings Association of Texas v. Timbers of Inwood Forest*, 484 U.S. 365 (1988).

Buried in the Points and Authorities, not stated with particularity in the Motion, almost as an afterthought, is the statement that Debtor is "surrendering" the "vehicle." Points and Authorities, p.4:2–8. The term "vehicle" is not defined in the Points and Authorities, nor is it defined in the Motion.

Additionally, in the Motion Movant makes a passing reference to Debtor's plan not providing for payments to Movant and that Debtor proposes to surrender a vehicle. No reference is made to a Statement of Intention filed by Debtor or any plan terms, just that passing reference.

Then, without stating why or a basis for such relief, the Conclusion to the Motion/Points and Authorities states that the fourteen-day stay imposed by the U.S. Supreme Court in Federal Rule of Bankruptcy Procedure 4003(a)(3) should be waived. The court cannot determine what possible grounds or cause could exist for waiving the required stay, with none provided by Movant.

Trustee's Response and Confirmed Chapter 13 Plan

The Chapter 13 Trustee filed his Response directing the court to the Chapter 13 Plan, stating that Movant's claim is provided for as a Class 3 surrender. Such a surrender includes, once the Plan is confirmed, termination of the automatic stay to allow the creditor to obtain possession of, sell, and apply the proceeds from the sale of the collateral to the secured claim. Chapter 13 Plan, ¶ 2.10; Dckt. 5. This modification of the automatic stay is narrower than the "enforce all of the creditor's contract rights" requested by Movant.

On June 14, 2017, the order confirming the Chapter 13 Plan providing for the surrender was entered. However, the Motion was filed on June 6, 2017, more than a week earlier. At that time Movant did not know if the Plan would actually be confirmed. But this was after the May 25, 2017, deadline for any objections to confirmation to be filed. Notice of Bankruptcy, Section 9; Dckt. 10 at 2.

The court having confirmed a Chapter 13 Plan that provides for a surrender of the collateral to Movant, the present Motion has been rendered moot. The Motion is denied without prejudice.

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 LBS Financial Credit Union ("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 Motion for Relief From the Automatic Stay is denied without prejudice, having been rendered moot by confirmation of the Chapter 13 Plan

which provides, " Upon confirmation of the plan, all bankruptcy stays are modified to allow a Class 3 secured claim holder to exercise its rights against its collateral." Chapter 13 Plan, ¶ 2.10, Dckt. 5; Order Confirming, Dckt. 25.