

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher M. Klein
Bankruptcy Judge
Sacramento, California

October 1, 2019 at 1:30 p.m.

1. [19-25022](#)-C-13 EDUARDO MONTERROSA MOTION FOR RELIEF FROM
[JCW](#)-1 Mary Ellen Terranella AUTOMATIC STAY AND/OR MOTION
FOR RELIEF FROM CO-DEBTOR STAY
8-21-19 [[10](#)]
WELLS FARGO BANK, N.A. VS.

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-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, creditors, parties requesting special notice, and Office of the United States Trustee on August 22, 2019. 28 days' notice is required. That requirement was met.

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 xxxxxx.
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Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to Eduardo Monterrosa's ("Debtor") real property commonly known as 167 Bayside Ter, Vallejo, California ("Property"). Movant has provided the Declaration of Charice Gladden to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues that there are one or more defaults in payments since August 15, 2019 but does not specify what payments or in what amount. Declaration, Dckt. 12. Movant also provides evidence that there are 49 pre-petition payments in default, with a pre-petition arrearage of \$102,783.19. *Id.*

Movant also argues that Debtor's non-filing spouse has previously filed three Chapter 13 cases filed since June of 2017. Movant states that the three previous cases were all dismissed. The Movant state that the property was listed in the three cases as evidence in support for prospective relief under 11 U.S.C. 362(d) (4).

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on September 13, 2019. Dckt. 27. The Trustee notes that Debtor does not have a confirmed Plan. Movant is provided for in Class 1 of Debtor's proposed plan; however, the Trustee flags for the court that proposed payments do not appear sufficient to fully pay the arrears. Proposed Plan, Dckt. 18.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on September 17, 2019. Dckt. 30. Debtor opposes the requested relief stating that the requested relief is premature, the Meeting of Creditors is set to be held on September 26, 2019. Additionally, Debtor's counsel proposes reducing monthly Attorney Fee payments from \$750.00 per month to \$67.00 in order to resolve the Trustee's concern. The Debtor's Plan will provide \$136,596.00 over the 5 year plan term which Debtor argues is sufficient to provide for the secured and priority claims.

Additionally, Debtor disputes certain allegations raised by the Movant. Debtor disputes that there have been no payments since August 1, 2015. Specifically Debtor points out that in Debtor's non-filing spouses Chapter 13 proceeding (Case No. 17-23780) the plan was dismissed after a plan was confirmed and payments were made. Additionally, while Debtor does not dispute that his spouse filed three Chapter 13 cases since June of 2017, Debtor does not agree that this was a bad faith scheme. Debtor notes that there were good faith attempts; however, both Debtor and Debtor's spouse suffered significant health related issues that affected their ability to complete prior bankruptcy plans. Debtor further asserts that the proposed Plan in this case is made in good faith and will provide for the Movant's claim.

DISCUSSION

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 \$400,480.03 (Declaration, Dckt. 12), while the value of the Vehicle is determined to be \$395,000.00 as stated in Schedules B and D filed by Debtor.

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.

At the hearing ---

The court shall **xxxxxx**.

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.* Here Creditor identifies the prior bankruptcy proceedings of Debtor's non-filing spouse.

- A. Case No 17-23780 - Non-filing Spouse's Case
 - 1. Filed: June 5, 2017
 - 2. Chapter 13
 - 3. Dismissal Date: June 13, 2018
 - 4. Reason for Dismissal: Voluntary Dismissal
- B. Case No 18-24999 - Non-filing Spouse's Case
 - 1. Filed: August 9, 2018
 - 2. Chapter 13
 - 3. Dismissal Date: November 15, 2018
 - 4. Reason for Dismissal: Delinquent in proposed payments and non-filing of tax returns
- C. Case No 19-20068- Non-filing Spouse's Case
 - 1. Filed: January 7, 2019
 - 2. Chapter 13
 - 3. Dismissal Date: July 3, 2019
 - 4. Reason for Dismissal: Not timely filing an Amended Plan. The court notes that debtor, Melanie Monterrosa, attempted to set aside the dismissal asserting excusable neglect by counsel. The court however, did not set aside the dismissal but noted it was without prejudice to filing another case. Dckt. 72.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 13 case in the Eastern District of California does not appear to be part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple

bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. The filing of the current Chapter 13, does not appear to be scheme.

The court finds that there are insufficient grounds for issuing an order pursuant to 11 U.S.C. § 362(d)(4).

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. ("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 **xxxxxx**.

No other or additional relief is granted.

2. [19-22049](#)-C-13 WENDY MORGAN
[DBJ](#)-1 Catherine King

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR ADEQUATE PROTECTION
6-11-19 [[20](#)]

CARLA/LYLE VERRY VS.

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-Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Counsel, Chapter 13 Trustee, creditors, and Office of the United States Trustee on June 11, 2019. By the court's calculation, 35 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 xxxx.

Lyle Verry and Carla Verry ("Movants") seek relief from the automatic stay with respect to Wendy Kristine Morgan's ("Debtor") real property commonly known as 0000 Dunstone, Palermo, California 95968 ("Property"). Movants have provided the Declaration of Lyle Verry to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movants argue Debtor has not made 2 post-petition payments, with a total of \$1,590.96 in post-petition payments past due. Declaration, Dckt. 23. Movants also provide evidence that there are 9 pre-petition payments in default, with a pre-petition arrearage of \$7,159.32. *Id.* Debtor's Promissory note called for monthly payments of \$795.78, including 5% interest per annum. Debtor is in default of her obligations under the Note for failure to make the payments due on August 1, 2018 and payments due thereafter. There is now due a sum of \$81,212.36 plus additional interest and attorney fees. Debtor received default notices from Movant, but failed to act. Movant has now started a non-judicial foreclosure as a result of non-payment.

Movant argues that Debtor has made waste of the property by putting several abandoned vehicles, an un-saleable 5th wheel and miscellaneous trash and junk on the property. Movant attached Exhibits with photographic

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evidence attesting to the waste. Movant contends that this waste has dramatically decreased the value of the property to approximately \$50,000 to \$60,000 in its present condition. Movant also takes issue with the fact that Debtor lists the property as her "homestead" in Schedule C, yet there are no livable structures on the property and the debtor is not residing there other than to camp occasionally.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on July 1, 2019. Dckt. 28. The Chapter 13 Trustee states that Debtor is delinquent \$1,230.00 under the proposed plan. Debtor has paid a total of \$1,230.00 to date. The Chapter 13 Trustee received payments from Debtor on June 3, 2019 and June 4, 2019. The Chapter 13 Trustee has a balance on hand of \$351.28 net of Trustee fees. Movant is included as creditor in Class 1 of the proposed plan with Post-Petition Monthly Payment of \$800.00. Dckt. 11. The Chapter 13 Trustee has generated a disbursement of \$800.00 to Movant on June 28, 2019. The Chapter 13 Trustee requests that the Court consider these matters.

DEBTOR'S RESPONSE

Debtor filed an Opposition on July 2, 2019. Dckt. 32. Debtor concedes that she entered into a Promissory note with Movant on May 1, 2018 secured by the subject Property. Debtor also concedes that she was delinquent in her payments as noted in the Motion. Debtor argues that Movant is adequately protected because Movant is provided for as a Class 1 claim, paying post-petition ongoing payments along with \$296.67 per month to be applied to the arrears. Debtor concedes that if she fails to perform her payments on the Promissory Note that Movant can foreclose on the property. Debtor notes that the deadline to file claims was June 11, 2019 and Movant failed to file a claim by then. Debtor shall file a claim then enabling the Chapter 13 Trustee to make payments on the mortgage arrears.

In response to "Lack of Equity," Debtor believes that the property value in the area is increasing after the devastating Camp Fires in November 2018. Debtor plans to remove the Vehicles and install some permanent structures on the Property once the Note is paid.

DISCUSSION

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 \$81,212.36 (Declaration, Dckt. 23), while the value of the Property is determined to be \$110,000, as stated in Schedules A/B filed by the Debtor.

Debtor lists the total value of the Property at \$110,000.00 and lists the obligation to Movant at \$79,541.85. Movant argues that Debtor owes \$81,212.36 in addition to costs and advances because of interest. According to Movant, Debtor has committed waste on the Property. The Property is an unimproved lot that is used primarily for pastureland with no structures or other miscellaneous junk on the property at the date of sale. Since the sale in April 2019, Movant argues that Debtor has made waste of the property by putting several abandoned vehicles, an un-saleable 5th wheel and miscellaneous trash and junk on the property. Movant attached Exhibits with photographic evidence attesting to the waste. Movant contends that this waste has dramatically decreased the value of the property to approximately

\$50,000 to \$60,000 in its present condition.

Movant also takes issue with the fact that Debtor lists the property as her "homestead" in Schedule C, yet there are no livable structures on the property and the debtor is not residing there other than to camp occasionally. Debtor's filed Response rebuts this assumption and states that the Camp Fire in November 2018 caused her to leave the property, but she plans on returning and making the 5th wheel her permanent residence. Dckt. 32.

At the hearing the parties addressed whether Debtor's delinquency has been cured and the allegations of waste to the property. The Court continues the hearing to 1:30 p.m. on August 13, 2019. Debtor shall file supplemental pleadings documenting the condition of the Property on or before August 5, 2019; and Supplemental Reply Pleadings shall be filed and served on or before August 9, 2019.

DEBTOR'S SUPPLEMENTAL REPLY:

On August 5, 2019, Debtor filed a declaration stating that she has taken measures to clear the property of debris and vehicle parts. Dckt. 38. Debtor's declaration refers to photographs documenting the efforts, however, no such photographs were filed in connection with the declaration.

CREDITOR'S SUPPLEMENTAL OPPOSITION:

On August 8, 2019, Creditor filed a declaration of Lyle Verry in response. Dckt. 40. Creditor disputes Debtor's contention that meaningful clean up efforts have been completed. In support, Creditor provides photographs taken on August 2, 2019 as proof that little improvement has taken place.

AUGUST 13, 2019 HEARING:

At the August 13, 2019 hearing the parties agreed to further continue the hearing to allow Debtor additional time to demonstrate whether sufficient efforts to preserve the property were being taken.

CREDITOR'S SECOND SUPPLEMENTAL DECLARATION:

On September 24, 2019, Creditor filed an additional declaration of Lyle Verry stating that Debtor has not taken sufficient steps to cleanup the subject property. Dckt. 44.

DISCUSSION:

At the hearing ----

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 Lyle Verry and Carla Verry ("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 hearing on the Motion for Relief from the Automatic Stay is **XXXX**.

3. [19-22158](#)-C-13 MICHAEL PETKUS
[JCW](#)-1 Thomas Moore

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR RELIEF FROM CO-DEBTOR STAY
8-26-19 [[43](#)]

WELLS FARGO BANK, N.A. VS.

Final Ruling: No appearance at the October 1, 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 August 26, 2019. 28 days' notice is required. That requirement was met.

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.

Wells Fargo Bank, N.A. as Trustee for Banc of America Funding 2004-3 Trust, by and through its servicing agent JP Morgan Chase Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to Michael J. Petkus' ("Debtor") real property commonly known as 7850 Eagle View Lane, Granite Bay, California ("Property"). Movant has provided the Declaration of Della Walker to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made 3 post-petition payments, with a total of \$10,356.36 in post-petition payments past due. Declaration, Dckt. 46.

CHAPTER 13 TRUSTEE'S RESPONSE:

David Cusick ("the Chapter13 Trustee") filed a Response on September 16, 2019. Dckt. 52. The Trustee states he does not oppose the requested relief and flags for the court that the Debtor's proposed Plan provides for Movant's Claim in Class 3, surrender of collateral.

DISCUSSION

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 \$727,926.49 (Dckt. 46) and the value of the property is determined to be \$700,000.00, the value as stated in Schedules B and D filed by Debtor.

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. Here there are post-petition payment defaults and the Debtor has proposed surrendering the property.

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.

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees (other than to state Movant seeks the fees "pursuant to the Security Agreement"). No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

Furthermore, a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

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, 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 will not grant additional relief merely stated in the prayer.

Movant has not 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 not granted.

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 Banc of America Funding 2004-3 Trust, by and through its servicing agent JP Morgan Chase Bank, N.A. ("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 Movant, 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 real property commonly known as 7850 Eagle View Lane, Granite Bay, California, ("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 Property.

IT IS FURTHER ORDERED that the request to terminate the co-debtor stay of Tanya Petkus of 11 U.S.C. § 1301(a) is granted to the same extent as provided in the forgoing paragraph granting relief from the automatic stay arising under 11 U.S.C. § 362(a).

No other or additional relief is granted.

4. [19-25159](#)-C-13 ADAM DAUGHERTY
[MLG](#)-1 Pro Se

MOTION FOR RELIEF FROM
AUTOMATIC STAY
8-30-19 [[11](#)]

MALCOM TUCKER VS. DEBTOR
DISMISSED 9/3/19

Final Ruling: No appearance at the October 1, 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 (*pro se*), Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2019. 28 days' notice is required. That requirement was met.

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 denied without prejudice as moot, the automatic stay having been terminated by dismissal of this bankruptcy case.

Malcom Tucker("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6640 Carmelwood Drive, Citrus Heights, California ("Property"). The moving party has provided the Declaration of Lisa Lyons to introduce evidence as a basis for Movant's contention that Adam Daugherty ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Based on the evidence presented, Debtor would be at best a tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Sacramento and a trial was scheduled for July 9, 2019 but was stayed due the Debtor's bankruptcy proceeding. Lyons Declaration, Dckt. 14.

Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2).

The instant case was dismissed on September 3, 2019, for not filing documents. Dckt. 17.

The applicable Bankruptcy Code provision for the matter before the court is 11 U.S.C. § 362(c)(1) and (2). That section provides:

In relevant part, 11 U.S.C. § 362(c) provides:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such **property is no longer property of the estate;**

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) **the time the case is dismissed;** or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

11 U.S.C. § 362(c) (emphasis added).

When a case is dismissed, 11 U.S.C. § 349 discusses the effect of dismissal. In relevant part, 11 U.S.C. § 349 states:

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) **revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.**

11 U.S.C. § 549(c) (emphasis added).

Therefore, as of September 3, 2019, the automatic stay as it applies to the Property, and as it applies to Debtor, was terminated by operation of law. At that time, the Property ceased being property of the bankruptcy estate and was abandoned, by operation of law, to Debtor.

The court shall issue an order confirming that the automatic stay was terminated and vacated as to Debtor and the Property on September 3, 2019.

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 Malcom Tucker ("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 Motion is denied without prejudice as moot, this bankruptcy case having been dismissed on September 3, 2019 (prior to the hearing on this Motion). The court, by this Order, confirms that the automatic stay provisions of 11 U.S.C. § 362(a) were terminated as to Adam Daugherty ("Debtor") pursuant to 11 U.S.C. § 362(c)(2)(B) and the real property commonly known as 6640 Carmelwood Drive, Citrus Heights, California, pursuant to 11 U.S.C. § 362(c)(1) and § 349(b)(3) as of the September 3, 2019 dismissal of this bankruptcy case.

5. [14-30993](#)-C-13 KELLY GONZALVES
[AP-1](#) Gary Fraley

MOTION FOR RELIEF FROM
AUTOMATIC STAY
9-3-19 [[77](#)]

WELLS FARGO BANK, N.A. VS.

Final Ruling: No appearance at the October 1, 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 September 3, 2019. 28 days' notice is required. That requirement was met.

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 granted, the court confirming that "all bankruptcy stays are modified to allow Movant and its agents and successors, as 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."

Creditor, Wells Fargo Bank, N.A. ("Movant"), moves the court for an order confirming that the automatic stay is not in effect in this case pursuant to 11 U.S.C. § 362(j). Movant seeks confirmation from the court that no automatic stay in effect on real property commonly known as 4805 Leemans Way, Elk Grove, California ("Property") is not in effect pursuant to the debtor, Kelly Ann Gonzalves ("Debtor"), Plan.

The grounds stated with particularity in the Motion are:

- A. Debtor confirmed a Chapter 13 Plan on July 8, 2015. Order Confirming, Dckt. 70.
- B. Movant's claim is provided for payment as a Class 4

Claim. Plan, Dckt. 60.

- C. The terms for treatment of the Class 4 Claim of Movant, include the following (emphasis added), Plan ¶ 2.11, *Id.*,:

"Class 4 claims mature after the completion of this plan, are not in default, and are not modified by this plan. These claims shall be paid by Debtor or a third person whether or not the plan is confirmed. **Upon confirmation of the plan, all bankruptcy stays are 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.**

Based on the above, Movant requests relief from the court as follows: "1. For an Order stating that no automatic stay applies to the Property; 2. For an Order modifying the automatic stay to protect the interest of Moavnt, as the Court deems proper. . . ." Motion, Dckt. 79.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on September 16, 2019. Dckt. 85. The Chapter 13 Trustee states that Movant, is the creditor listed for the Property in Class 4 of the Plan, providing for the stay to be modified upon confirmation for the creditor to exercise its rights upon default.

DISCUSSION

Movant contends that Class 4 of the Plan confirmed on July 8, 2015 states that "Upon Confirmation of the plan, all bankruptcy stays are 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." See Dckt. 60.

Movant's contention is that the above plan provision results in the following: "there is no automatic stay in effect on the Property. . . ." Motion, Dckt. 44 at 2:16.5-17.5. However, under the plain language of the Class 4 treatment, the automatic stay has only been Modified, not terminated, by operation of that provision. The modification is for the limited purpose, "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." The automatic stay exists, but it is modified. (The court does not endeavor to determine if there are other provisions of the Plan that might affect the automatic stay, leaving such to Movant in later motion(s) if necessary.)

The court recognizes that creditors may need an order specifying the continuing effect and modification of an automatic stay when State recording and filing law come into play, as well as for title insurance purposes.

The Ninth Circuit Court of Appeal has recognized the basic "discretion is the better part of valor" principle when it comes to the automatic stay. Seeking a separate order clearly specifying the scope of the relief granted in

the Plan is not inappropriate.

The court grants the Motion, granting relief that under the terms of the confirmed Chapter 13 Plan, Dckt. 60, in this bankruptcy case, "all bankruptcy stays are modified to allow Movant, and its agents and successors, as] 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.

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 Ditech Financial 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 that the relief is granted pursuant to the Motion, the court confirming that "all bankruptcy stays are modified to allow Movant and its agents and successors, as 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." Confirmed Chapter 13 Plan, Dckt. 60; Order Confirming, Dckt. 70.
