

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 25, 2016, at 1:30 p.m.

1. [16-24111](#)-E-13 **ABBIGAIL CLYMER**
NLG-1 **D. Randall Ensminger**

**CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
8-24-16 [[25](#)]**

BOSCO CREDIT, LLC VS.

Tentative Ruling: The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditor Wells Fargo Bank, and Office of the United States Trustee on August 24, 2016. By the court's calculation, 27 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

The Motion for Relief From the Automatic Stay is granted.
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Abbigail Clymer ("Debtor") filed the instant bankruptcy case on June 24, 2016. Dckt. 1

Bosco Credit LLC (“Movant”) seeks relief from the automatic stay with respect to the real property commonly known as 6059 Kingwood Circle, Rocklin, California (the “Property”). Movant has provided the Declaration of Gina D’Elia to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Gina D’Elia Declaration states that there are two (2) post-petition defaults in the payments on the obligation secured by the Property, with a total of \$594.58 in post-petition payments past due. The Declaration also provides evidence that there are ninety-seven (97) pre-petition payments in default, with a pre-petition arrearage of \$26,811.99. Dckt. 27.

Movant’s Motion for Relief from Automatic Stay lists two (2) bankruptcy cases—including the current one—commenced by Debtor, since September 4, 2009, that affect Movant’s interest in the Property. Those cases are:

- A. Case No. 09-39133
 - 1. Filed: September 4, 2009
 - 2. Type: Chapter 7
 - 3. Date of Discharge: December 9, 2009.
 - 4. This case was reopened on March 28, 2016. Movant requested relief from the automatic stay, which was denied as moot. Debtor also requested the court to convert the case to a Chapter 13, which was denied, and the case was closed once again on July 21, 2016.
- B. Case No. 16-24111
 - 1. Filed: June 24, 2016
 - 2. Type: Chapter 13
 - 3. Instant Case
 - 4. This case was filed while the prior bankruptcy action and Debtor’s Motion to Convert the prior action were pending still.

TRUSTEE’S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on September 6, 2016. Dckt. 38. The Trustee states that Debtor is current on plan payments under the proposed plan filed on June 24, 2016 (Dckt. 5). The Trustee notes that no confirmed plan exists, and a proposed plan was denied confirmation on August 30, 2016 (Dckt. 34).

The Trustee supplies the following information:

- A. Debtor has paid a total of \$813.94 to date.
- B. One disbursement of \$300.00 has been made to Franklin Credit Management Corp., which represents two adequate protection payments of \$150.00 for the months of July and August 2016.

DEBTOR'S OPPOSITION

Debtor filed opposition on September 7, 2016. Dckt. 44. Debtor asserts that she is currently in the process of seeking a loan modification of Movant's note and second deed of trust. Debtor believes the Chapter 13 plan will give her a "platform" from which to negotiate a restructuring with Movant over the note and second deed of trust (\$68,887.35) and to protect the equity in her home (\$81,312.65).

Debtor intends to file an amended plan with all necessary pages to replace the current plan that misses pages 3, 4, and 7.

Debtor states that she will continue to make plan payments of \$406.97 per month, and \$150.00 of that amount will be paid to Movant.

SEPTEMBER 20, 2016 HEARING

At the hearing, the court denied the requested relief from stay based on 11 U.S.C. § 362(d)(4), and the court continued the matter on the requested relief from stay under 11 U.S.C. § 362(d)(1) because Debtor stated that she was attempting to find a roommate to increase her income, which was why Debtor had not filed an amended plan reflecting her current finances. Dckt. 59.

DISCUSSION

Neither a supplemental pleading nor an amended plan has been filed with the court since the September 20, 2016 hearing.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$242,687.35 (including \$68,887.35 secured by Movant's second deed of trust), as stated in Schedule D filed by Debtor. The value of the Property is determined to be \$320,000.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay as cause under 11 U.S.C. § 361(d)(1). In this case, the equity cushion in the Property for Movant's claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

While Debtor professes to be prosecuting a Chapter 13 Plan, there is no proposed plan before the court. Confirmation was originally delayed due to what appears to have been a clerical error when the plan was filed (pages missing from Plan filed).

However, it was made clear to Debtor as early as August 4, 2016, that the Plan filed with the court was defective. Trustee's Objection to Confirmation, Dckt. 17. In the eighty-two (82) days that have passed since that time, no action has been taken by Debtor to file an amended plan and motion to confirm an amended plan. Rather, Debtor is living in the no-plan limbo. That is not consistent with prosecuting this case in good faith.

On Schedule I, Debtor states that her monthly gross income is \$2,512.00. Dckt. 1 at 28. On Schedule J, excluding secured debt payment on her residence, Debtor states under penalty of perjury that her reasonable and necessary monthly expenses are \$1,167.00. *Id.* at 30. No provision is made for property taxes or property insurance. No provision is made for any income taxes. Debtor purports to have monthly food and housekeeping supplies expenses of only \$200.00 per month. Allowing \$50.00 per month for household supplies, Debtor purports to pay only \$1.66 per meal (assuming a 30 day month). This does not appear to be reasonable.

Additionally, Debtor lists no expenses for home maintenance, repair, or upkeep. This too appears unreasonable.

Debtor's real property is stated to have a value of \$320,000.00. Schedules A/B and D, Dckt. 1. Wells Fargo Bank, N.A. is listed as having a claim in the amount of \$169,000.00 and Movant is listed as having a Claim in the amount of \$70,000.00. By Debtor's calculation there is approximately a \$90,000.00 equity cushion for both creditors.

Debtor purports to make \$406.97 in monthly payments, of which \$150.00 would be paid to Movant. There is no indication as to why or how this is a reasonable payment.

Wells Fargo Bank, N.A. has filed its proof of claim, stating a secured claim in the amount of \$169,008.61. Proof of Claim No. 5. The monthly payment on this claim is stated to be \$917.70. *Id.* Debtor has listed \$938.00 on Schedule J as the payment for her home.

Movant has sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1). Though given the opportunity to prosecute a Chapter 13 Plan that provides for a possible loan modification, Debtor has failed to act.

The Relief From the Automatic Stay pursuant to 11 U.S.C. § 362(d)(1) is granted.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is 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 Bosco Credit 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 automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Bosco Credit LLC, 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 which 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 obtain possession of the real property commonly known as 6059 Kingwood Circle, Rocklin, California.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

No other or additional relief is granted.

ALLY BANK 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.

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 11, 2016. By the court's calculation, 14 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). The 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, -----

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<p>The Motion for Relief From the Automatic Stay is granted.</p>

Matthew Cox ("Debtor") commenced this bankruptcy case on July 25, 2016. Ally Bank ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Ford FR3 M-25DS, VIN ending in 2228 ("Vehicle"). The moving party has provided the Declaration of Tianna Green to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Tianna Green Declaration provides testimony that Debtor has not made two (2) post-petition payments, with a total of \$1,210.82 in post-petition payments past due.

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 \$94,119.45, as stated in the Tianna Green Declaration, while the value of the Vehicle is determined to be \$93,503.00, as stated in Schedules B and D filed by Debtor.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. Exhibit D, Dckt. 19. 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 NADA Valuation Report lists values of \$67,400.00 for trade-in and \$88,400.00 for used retail.

The Trustee entered a statement of non-opposition on October 14, 2016.

DISCUSSION

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay because the Debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375–76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or for the Estate. 11 U.S.C. § 362(d)(2).

The court shall issue an order terminating and vacating the automatic stay to allow Ally Bank, 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.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is 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 Ally Bank (“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 2016 Ford FR3 M-25DS, VIN ending in 2228 (“Vehicle”), and applicable non-bankruptcy law to obtain possession of, non-judicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.