

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Modesto, California

January 5, 2017, at 10:00 a.m.

1. **16-90853-E-7** **ALBA BACA** **MOTION FOR RELIEF FROM**
APN-1 **Pro Se** **AUTOMATIC STAY**
 12-1-16 [22]
WELLS FARGO BANK, N.A. VS.

Final Ruling: No appearance at the January 5, 2016, hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on December 1, 2016. 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). 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.
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Alba Baca ("Debtor") commenced this bankruptcy case on September 16, 2016. Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2011 Toyota Camry, VIN ending in 0006 ("Vehicle"). The moving party has provided the Declaration of Marquita Braswell to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

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The Marquita Braswell Declaration provides testimony that Debtor has not made two post-petition payments, with a total of \$585.00 in post-petition payments past due. The Declaration also provides evidence that there is one pre-petition payment in default, with a pre-petition arrearage of \$285.60.

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 \$6,575.88, as stated in the Marquita Braswell Declaration, while the value of the Vehicle is determined to be \$12,000.00, as stated in Schedules B and D filed by Debtor.

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.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Vehicle 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).

Movant's contention that the mere lack of equity is "cause," as set forth in 11 U.S.C. § 362(d)(1) is without merit. Lack of equity is one of the two necessary elements for relief from the automatic stay under 11 U.S.C. § 362(d)(2). The fact that the debtor has no equity in the estate is not sufficient standing alone to grant relief from the automatic stay under 11 U.S.C. § 362(d)(1). *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984); *In re Suter*, 10 B.R. 471, 472 (Bankr. E.D. Penn. 1981).

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. 11 U.S.C. § 362(g)(2); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, 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 Vehicle is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Most importantly, Debtor filed a Statement of Intention to abandon the Vehicle to Movant. There is equity in the Vehicle to support Movant's lien, but Movant has shown that Debtor intends to abandon the Vehicle. Therefore, Movant has shown sufficient facts to support terminating the automatic stay.

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 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.

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 in valid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) 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 addressing a request for 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 Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

Such “silly” requests have been presented to this court for months now by this Movant and its attorney. The court has identified this issue, but Movant appears to be undeterred by the law. In conducting a simple internet search, the court finds an earlier ruling addressing this issue for Movant and counsel that were issued November 10, 2016; *In re Greener*, APN-1, 16-90840.

In light of this repeated request for relief which the court cannot identify any legal basis or the existence of any stay to be terminated, the court will do the following:

- A. The court will canvas the other bankruptcy judges in the Ninth Circuit to determine what legal basis they have cited from granting such relief, if such relief is granted by them, and how they address such request for non-existent relief if no basis exists for the relief requested.
- B. If a future motion is filed requesting such relief, without showing proper grounds, and a legal basis for Movant contending that such relief is necessary is not stated with particularity (Fed. R. Bankr. P. 9013), and Movant has not provided a separate points and authorities supporting the imposition of the automatic stay upon conversion and the proper legal determination of terminating such stay before it exists, the court will require Movant’s counsel to appear at the hearing (telephonic appearance permitted) to explain to the court: (1) why no such grounds are stated in the motion and why no points and authorities on that issue has been provided, and (2) how requesting such relief in the prayer is consistent with the certifications by an attorney and by the client arising under Federal Rule of Bankruptcy Procedure 9011.
- C. If Movant or counsel have motions that have already been filed which make such request for relief of a future prospective stay, Movant or counsel can file an amendment to the motion providing that such relief from any stay that may arise if the case is converted is dismissed, with the amendment filed at least one week before the scheduled hearing on the motion.

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 Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services (“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 2011 Toyota Camry (“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 the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

No other or additional relief is granted.