

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

January 26, 2023 at 10:00 a.m.

1.	<u>21-90584-E-7</u> <u>22-9004</u>	MARIA CUEVAS LEMUS CAE-1	CONTINUED STATUS CONFERENCE RE: COMPLAINT 10-6-22 <u>1</u>
CUEVAS LEMUS V. MARTINEZ,			

Plaintiff's Atty: Marc Voisenat
Defendant's Atty: Arnold L. Graff

Adv. Filed: 10/6/22
Answer: 11/28/22

Nature of Action:
Validity, priority or extent of lien or other interest in property
Injunctive relief - imposition of stay
Declaratory judgment

Notes:
Continued from 12/15/22 to be conducted in conjunction with the hearing on the Motion for Relief From the Automatic Stay.

The Status Conference is XXXXXXX
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SUMMARY OF COMPLAINT

The Complaint filed by Maria Dolores Cuevas Lemus ("Plaintiff-Debtor"), Dckt. 1, asserts claims for alleged violation of the automatic stay (post-petition foreclosure), a determination that the alleged foreclosure is void, and injunctive relief to prevent Defendant from taking any other action to control or dispose of the property which is the subject of the alleged void foreclosure.

SUMMARY OF ANSWER

Arturo Martinez (“Defendant”) have filed an Answer, Dckt. 11 , admitting and denying specific allegations. Twenty-One Affirmative Defenses are stated.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff-Debtor Maria Dolores Cuevas Lemus alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Complaint ¶¶ 2, Dckt. 1. In the Answer, Defendant Arturo Martinez admits the allegations of jurisdiction and that this is a core proceeding. Answer ¶¶ 3; Dckt. 11. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

DECEMBER 15, 2022 STATUS CONFERENCE

The Parties are actively negotiating a possible settlement and requested a continuance of the Status Conference. The Status Conference is continued to January 26, 2023 at 10:00 a.m. (Specially Set Time) to be conducted in conjunction with a motion for relief from the stay.

JANUARY 26, 2023 STATUS CONFERENCE

At the Status Conference, **XXXXXXX**

ARTURO MARTINEZ VS.

DEBTOR DISMISSED: 01/04/2022

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 7 Trustee, Interested Party and Office of the United States Trustee on December 14, 2022. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Motion for Relief to Annul 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.

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

Arturo Martinez ("Movant") seeks relief from the automatic stay with respect to Maria Dolores Cuevas Lemus's ("Debtor") real property commonly known as 600 West Main Street, Crows Landing, California ("Property"). Movant has provided the Declaration of Elizabeth Knight to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The instant case was dismissed on January 4, 2022, for failing to timely file documents. Order, Dckt. 13. However, prior to the dismissal, on December 17, 2022 at 1:02 p.m., Movant completed a scheduled foreclosure sale of the Property. The Petition was filed minutes prior to the foreclosure sale, on December 17, 2022 at 1:00 p.m. Voluntary Petition, Dckt. 1.

Movant requests annulment of the automatic stay "*nunc pro tunc*" to have no force or effect on Movant's December 17, 2021 foreclosure sale, pursuant to 11 U.S.C. § 362.

Nunc Pro Tunc

As a preliminary matter, the Motion for Relief is seeking a “retroactive authorization,” annulling the stay, rather than a *nunc pro tunc* order. The Ninth Circuit has noted that *nunc pro tunc* approval is not the proper name for seeking retroactive authorization of actions in a bankruptcy case. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 515 n. 4 (9th Cir. 2007). *Nunc pro tunc* orders are usually used to correct errors in the record and the failure of the court to issue a written order, and are extremely limited in scope. *Id.* The Ninth Circuit noted that while it is more accurate to call such after-the-fact authorizations “retroactive approvals,” it is customary, but not necessarily correct, to refer to them generically as *nunc pro tunc* in bankruptcy practice. *Id.* The two names stand for the same set of standards and can be used interchangeably. *See, e.g., Atkins v. Wain*, 69 F.3d 970, 974–78 (9th Cir. 1995) (alternating between using *nunc pro tunc* and “retroactive approval” when determining whether a law firm had established exceptional circumstances allowing them to be paid for services to debtor not approved by the court). This long standing Ninth Circuit law was restated by the Supreme Court in *Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696, 2020 U.S. LEXIS 1356 (2020), with the Supreme Court stating that using the term “*nunc pro tunc*” for retroactive relief not previously orally ordered, is not proper.

A bankruptcy court can exercise its equitable discretion to grant retroactive authorizations when it is appropriate to carry out the Bankruptcy Code and when the approval benefits the debtor’s estate. *In re Harbin*, 486 F.3d at 522. Retroactive approvals should only be used in “exceptional circumstances.” *Atkins*, 69 F.3d at 974.

Grounds for Relief

Movant alleges the following grounds and time line of events in their Memorandum of Points and Authorities (Dckt. 24) entitling them to relief from the stay:

1. April 16, 2021

- a. The original borrower, Evaristo Avila (“Borrower”), filed a second bankruptcy case. Memorandum, Dckt. 24 ¶ 2; Bankr. E.D. Cal. Case No. 21-90164.
- b. At the time of Borrower’s bankruptcy filing, Borrower owned the Property subject to this Motion. Movant held a note secured by a first position Deed of Trust against the Property. Memorandum, Dckt. 24 ¶ 2.

On the Petition and Schedules A/B, D, and H filed under penalty of perjury by Evaristo Avila, it is stated that Borrower lives at the Property, that Borrower is the sole owner of the Property, Borrower has two creditors with claims secured by the Property, there are no codebtors on any obligations owed by Borrower. 21--90164; Dckt. 1.

2. October 18, 2021

- a. Movant was granted relief from the automatic stay in Borrower’s bankruptcy case. Memorandum, Dckt. 24 ¶ 10; Bankr. E.D. Cal. Case No. 21-90164, Order on Motion for Relief, Dckt. 66.

3. Movant scheduled a foreclosure sale on the Property for December 17, 2021 at 1:00 p.m. Memorandum, Dckt. 24 ¶ 11.
4. **December 17, 2021**

- a. Hours before the scheduled foreclosure sale, Borrower transferred the Property to Debtor. *Id.* at 2:11-13.

The court notes, Borrower transferred the Property to both Debtor as her sole and separate real property and to Borrower as his sole and separate real property, as tenants in common. Grant Deed, Exhibit 7, Dckt. 29.

- b. 1:00 p.m. - Debtor filed for bankruptcy. *Id.* ¶ 15.
- c. 1:02 p.m. - The foreclosure sale completed. At the time of sale, the foreclosure trustee had no notice of any transfer of the Property or notice of Debtor's bankruptcy case. *Id.*
- d. 2:34 p.m. - Borrower recorded an unauthorized Deed purporting the transfer to Debtor as her sole and separate property, as a gift for no consideration. *Id.* ¶ 11; Grant Deed, Exhibit 7, Dckt. 29.

There are several significant points to note with respect to the transfer and the filing of the Bankruptcy Case by Debtor. The Deed (Exhibit 7) was not recorded until 2:34 p.m., which was more than an hour and one-half after the bankruptcy cases was filed and the non-judicial foreclosure sale occurred. From the Deed, it is not clear that Debtor had any interest in the Property when the nonjudicial foreclosure sale occurred.

Second, the Deed states that no transfer tax is owed because title to the property is being transferred as a gift. This raises potential issues of gift tax liability for Borrower.

Third, on December 17, 2021, Borrower was a debtor in his own Chapter 13 case. A review of the file for Borrowers bankruptcy case, 21-90164, shows that there was no order of the court issued authorizing the sale, gift, or other transfer of property from Borrower's bankruptcy estate to Debtor.

5. **December 29, 2021**

- a. Movant's foreclosure trustee ("Foreclosure Trustee") received notice that a bankruptcy case concerning Debtor was filed. Memorandum, Dckt. 24 ¶ 15. However:
 - i. The notice indicated the case was entered on December 17, 2021 at 1:19 p.m., 17 minutes after the sale occurred;
 - ii. Debtor was not a borrower under the loan documents;
 - iii. Debtor never provided the Foreclosure Trustee a copy of the unauthorized Deed;

- iv. Debtor never indicated that the sale violated any bankruptcy stay.

Id. 16.

6. **January 4, 2022**

- a. Debtor's case was dismissed. *Id.* ¶ 17; Order, Dckt. 13.

7. **February 14, 2022**

- a. Trustee's Deed Upon Sale was recorded in Stanislaus County. Memorandum, Dckt. 24 at 16-18; Declaration, Dckt. 26 ¶ 12; Trustee's Deed Upon Sale, Exhibit 8, Dckt. 29.

8. **October 6, 2022**

- a. Debtor filed an adversary proceeding against Movant alleging wrongful foreclosure. *Id.* ¶¶ 18-19; Adv. Case No. 22-09004.

9. **December 15, 2022**

- a. Movant filed the current Motion arguing cause exists under 11 U.S.C. § 362(d)(1) to annul the stay because:
 - i. Movant was unaware of the bankruptcy filing;
 - ii. Debtor was not a borrower under the loan documents;
 - iii. Debtor did not communicate to Movant that Movant's actions violated the automatic stay until the adversary proceeding was filed;
 - iv. The transfer and current bankruptcy case were an attempt to delay, hinder, and defraud Movant;
 - v. Not granting relief will be prejudicial to Movant; and
 - vi. Movant acted reasonably under the circumstances.

DEBTOR'S OPPOSITION

Debtor filed an opposition on January 13, 2023. Dckt. 32. Debtor states Movant has not met its burden warranting annulment of the stay. Debtor argues:

1. Debtor had a community property interest in the real property under state law as of November 19, 2014, and remained community property at the time the above case was filed. Opposition, Dckt. 32 at 2:21-25.

The court notes, as stated prior, the Grant Deed indicates that Borrower transferred the Property to both Debtor as her sole and separate real property and to Borrower as his sole and separate real property, as tenants in common. Grant Deed, Exhibit 7, Dckt. 29. Additionally, in Borrower's voluntary petition, stated under penalty of perjury, Borrower had the sole interest in the Property. Borrower did not indicate the Property was community property. Bankr. E.D. Cal. Case No. 21-90164, Dckt. 1.

Looking at Debtor's Schedule A/B filed in this Bankruptcy Case under penalty of perjury, Debtor states that she is the co-owner of the Property with at least one other person, and their interests are as tenants in common. Debtor states under penalty of perjury that the Property is not community property by not checking the box that it is community property. Schedule A/B; Dckt. 1 at 11.

On Schedule D Debtor lists Movant as having a lien on the Property, but no other creditors (with Borrower having stated under penalty of perjury that there were two creditors with liens on the Property). Schedule D, Dckt. 1 at 23.

Debtor's assertion of it being community property is in clear conflict with the statements under penalty of perjury that there is no community property.

2. Movant became aware of the bankruptcy on December 29, 2021. Movant proceeded to record a Trustee's Deed Upon Sale after being on notice. Opposition, Dckt. 32 at 4:4-9.

From review of Movant's supporting exhibits, Movant recorded the Trustee's Deed Upon Sale on February 14, 2022. Dckt. 29, Exhibit 8.

3. Although Movant was aware of the bankruptcy, Movant took no action to obtain relief from the Stay prior to recording its Trustee's Deed Upon Sale. Opposition, Dckt. 32 at 4:9-14.

MOVANT'S REPLY

Movant filed a reply on January 20, 2023. Dckt. 33. Movant states:

1. Debtor's opposition does not dispute that on December 17, 2021, Movant had no notice of the 1:00 p.m. bankruptcy filing prior to the foreclosure sale at 1:02 p.m. *Id.* at 2:23-26.
2. Debtor's opposition does not dispute that Debtor never provided Movant or the Foreclosure Trustee any notice of the unauthorized Grant Deed at any time prior to the adversary complaint being filed. *Id.* at 2-3.
3. Prior to the unauthorized Grant Deed, Debtor did not have an interest in the Property as community property. *Id.* at 3:4-17.

4. The Foreclosure Trustee did not have any duty to take any action to investigate whether someone not on record title had obtained stay protection. *Id.* at 3:18-25.
5. Debtor never notified Movant that the foreclosure sale violated the stay. *Id.* at 4:21-22. A letter dated March 4, 2022, was sent to Movant's attorney arguing a stay violation, however, it does not specify for what. *Id.* at 4-5.

DISCUSSION

Annulment of Stay

As is well established in the Ninth Circuit, an act taken in violation of the automatic stay is void, not merely voidable. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001); (*In re Schwartz*), 954 F.2d 569, 571 (9th Cir. 1992).

Congress provides for the court to annul the automatic stay so as to render what was void to not be void. However, retroactive annulment of the automatic stay is within the discretion of the court. *Nat'l Env'tl. Waste Corp. v. City of Riverside (In re Nat'l Env'tl. Waste Corp.)*, 129 F.3d 1052, 1054 (9th Cir. 1997). The court, in making a case-by-case review, must balance the equities to determine if annulment is justified. *Id.* at 1055. Though not dispositive, most courts consider two factors: "(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." *Id.*

In re Fjeldsted, the bankruptcy Appellate Panel for the Ninth Circuit expanded the factors a court may consider when deciding whether to annul the stay: the number of times a debtor has filed a petition; the extent of any prejudice, including to a bona fide purchaser; the debtor's overall good faith; the debtor's compliance with the Code; how quickly the creditor moved for annulment; and how quickly the debtor moved to set aside the action which occurred. *In re Fjeldsted*, 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003).

The court reviews the various framework of factors and states how they apply in this Motion as follows:

***Nat'l Env'tl. Waste Corp* Factors**

- (1) Whether the creditor was aware of the bankruptcy petition;

In the current action, it is not in dispute that at the time of the foreclosure proceeding, Movant was unaware of Debtor's bankruptcy filing, filed two minutes prior to the sale. Movant did not have knowledge of the bankruptcy case until twelve days after the bankruptcy filing and foreclosure occurred. In addition, Movant did not know Debtor had an interest in the Property until Debtor filed the adversary proceeding on October 6, 2022.

- (2) Whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor.

Borrower's bankruptcy case was open, and Movant received relief from the stay to proceed with rights arising under the promissory note and trust deed between Borrower and Movant. Movant was

proceeding with an authorized foreclosure sale. Borrower then engaged in an unauthorized transfer, transferring the Property to Debtor. The Property belonged to Borrower's bankruptcy estate.

Debtor then failed to prosecute their bankruptcy case. This led to dismissal of their case on January 4, 2022, for failure to file documents. Order, Dckt. 13. Debtor's failure to prosecute indicates a lack of good faith in filing, and strongly indicates that Debtor did not use the bankruptcy process the way it was intended.

The only clear reason for this transfer, and Debtor's filing bankruptcy on the same day of the scheduled foreclosure sale, would be to prevent the foreclosure sale from occurring. The bankruptcy filing appears to be a scheme to hinder or delay Movant's rights to the Property.

With respect to the purported transfer of title by Borrower during his bankruptcy case, as referenced above the transfer was not authorized by the Bankruptcy Court. Borrower had no right or power to transfer property of the bankruptcy estate in his case to Debtor. Several basic state and federal law principles come to mind:

- ◆ The purported deed signed by Borrower personally may be void or fraudulent, Borrower having no right to transfer title. Additionally, Borrower did not execute the Deed in his capacity as Chapter 13 debtor, which is the capacity he acts to exercise powers of a bankruptcy trustee to administer property of the bankruptcy estate. 11 U.S.C. § 1303.
- ◆ Transfer made with an intent to hinder, delay, or defraud any creditor is voidable under the California Uniform Voidable Transaction Act. Cal. Civ. §§ 2429 et. seq.; 11 U.S.C. § 544.
- ◆ A post-petition transfer not authorized by the court is avoidable as provided in 11 U.S.C. § 549.
- ◆ On Debtor's Statement of Intention for Individuals Filing Under Chapter 7 Movant's claim is listed and Debtor states claiming an exemption in the Property, but Debtor fails to specify (by not checking the appropriate box) whether Debtor intends to: Surrender the property, Retain the property and redeem it, Retain the Property and enter into a Reaffirmation Agreement, or Retain the Property on other grounds. Dckt. 1 at 52.

The court also notes that on Borrower's Statement of Financial Affairs, he states that he is currently married as of April 16, 2021. 21-90164; Dckt. 1 at 41. No legal actions, such as relating to a dissolution of marriage, are listed on the Statement of Financial Affairs. *Id.* at 45.

On Schedule I, Borrower listed his non-filing spouse as having monthly income of \$3,500 from being a child care provider, employed by Avila Maria Child Care. *Id.* at 35-36.

On her Statement of Financial Affairs Debtor states she is not married. Dckt. 1 at 40. Further, Debtor states that in the eight (8) years prior to the filing of her bankruptcy case on December 17, 2021, she never lived with a spouse in any community property state, including California. *Id.*, § 3.

This clearly conflicts with Debtor's counsel's argument (Debtor not provide a declaration) in the Opposition that:

In this case, the debtor had a community property interest in the real property under state law and her community property interest was property of the above estate as of November 19, 2014 and remained community property at the time the above case was filed. (RJN Exh 4 ¶¶ 9 and 10). See §541(a)(2)

Opposition, p. 2:22-25; Dckt. 32. Debtor states, under penalty of perjury that she is not married and did not live with a spouse in a community property state during the period December 17, 2013 through December 17, 2021. Debtor's counsel argument that the Property was community property as of November 19, 2014 (Opposition, p. 2:22-25; Dckt. 32) is contrary to Debtor's statements under penalty of perjury.

From the facts alleged and evidence provided, Debtor engaged in unreasonable and inequitable conduct.

Additionally, Movant has already spent significant time and resources during Borrower's bankruptcy case to properly obtain relief from the automatic stay with respect to the Property. Not annulling the stay would prejudice Movant.

In Re Fjeldsted Factors

Under the *In re Fjeldsted* factors, the Panel looked at refining and providing further guidance to the court as to factors that may apply. Relevant factors here include:

- A. Whether creditors knew of the stay but nonetheless took action, thus compounding the problem;

Again, there is no dispute that Movant was unaware of Debtor's bankruptcy filing prior to the sale.

Movant received notice of Debtor's bankruptcy filing on December 29, 2021. However, Movant was not provided the Grant Deed. Therefore, Movant was unaware that the foreclosure sale was in violation of the stay because neither Debtor nor Borrower informed Movant that Borrower transferred an interest in the Property to Debtor.

The court also notes that because the Deed was not recorded until after the non-judicial foreclosure sale occurred, it would not show up on a title report for the non-judicial foreclosure sale and would not be of record notice at the time of the foreclosure sale.

Although Movant recorded Trustee's Deed Upon Sale on February 14, 2022, after being on notice of Debtor's bankruptcy case, Movant was unaware that the Property was property of Debtor's bankruptcy estate.

- B. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violating conduct;

Movant became aware of the violation of the stay when the adversary proceeding was filed on October 6, 2022. Movant's Counsel and Debtor's Counsel immediately started communicating to resolve the disputes. Bankr. E.D. Cal. Adv. Case No. 22-09004, Joint Ex Parte Motion and Stipulation, Dckt. 8.

Movant filed their answer on November 28, 2022. Bankr. E.D. Cal. Adv. Case No. 22-09004, Answer, Dckt. 11. Movant filed the current Motion on December 14, 2022. Dckt. 21.

Although the stay violation occurred almost a year before Movant filed the current Motion, Movant filed the Motion roughly two months after receiving notice of the stay violation and only a few weeks after filing their answer in the adversary.

Movant acted quickly after receiving notice of the stay violation. Debtor, however, did not attempt to set aside the sale until roughly ten months after it took place. Debtor did not act expeditiously.

C. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;

As stated before, although Movant proceeded to record Trustee's Deed Upon Sale after receiving notice of Debtor's bankruptcy case, Movant was unaware that Debtor's automatic stay affected the Property at the time of sale. After learning that the foreclosure was in violation of the stay, Movant moved expeditiously to file both an answer to the Adversary and this Motion.

D. Whether annulment of the stay will cause irreparable injury to the debtor;

Debtor received an interest in the Property just hours prior to filing their bankruptcy case and the sale. The Property was transferred to Debtor by gift, and there is no evidence that any consideration was given.

There is no showing that annulling the stay will cause irreparable injury to the Debtor.

The court finds the balance of equities weighs in favor of annulling the stay. The Motion to Annul is granted.

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.

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 invalid 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, such request (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 Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

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 Motion to Annul Automatic Stay or in the Alternative In Rem Relief From Automatic Stay filed by Arturo Martinez (“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 annulled and vacated effective as of the commencement of this bankruptcy case to continue 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 600 West Main Street, Crows Landing, 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 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.

FINAL RULINGS

3. [22-90190-E-7](#)
[SKI-1](#)

ELVIRA ANTUNA
Mark O'Toole

MOTION FOR RELIEF FROM
AUTOMATIC STAY
12-27-22 [[63](#)]

TD BANK, N.A. VS.

Final Ruling: No appearance at the January 26, 2023 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 December 27, 2022. By the court's calculation, 30 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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TD Bank, N.A., Successor in Interest to TD Auto Finance LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Ford F-350, VIN ending in 3962 ("Vehicle"). The moving party has provided the Declaration of John Eng to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Elvira Antuna ("Debtor").

Movant argues Debtor has not made six post-petition payments, with a total of \$6,746.28 in post-petition payments past due. Declaration, Dckt. 69. Movant also provides evidence that there is one full and one partial pre-petition payment in default, with a pre-petition arrearage of \$1,127.35. *Id.*

J.D. Power Used Car Guide Valuation Report Provided

Movant has also provided a copy of the J.D. Power Used Car Guide 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).

DEBTOR'S NON-OPPOSITION

Debtor filed an Non-Opposition on January 11, 2023. Dckt. 71. Debtor asserts that they intend to surrender the vehicle.

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 \$54,699.29 (Declaration, Dckt. 69), while the value of the Vehicle is determined to be \$41,025.00, as stated on the NADA Valuation Report, which is slightly more than stated in Schedules A/B and D filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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.

11 U.S.C. § 362(d)(2)

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 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 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.

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 TD Bank, N.A. Successor in Interest to TD Auto Finance 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 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 F-350, VIN ending in 3962 (“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.

No other or additional relief is granted.

TD BANK, N.A. VS.

Final Ruling: No appearance at the January 26, 2023 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 Debtors, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 12, 2022. By the court's calculation, 45 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.

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

TD Bank, N.A., Successor in Interest to TD Auto Finance LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2020 GMC Sierra 1500, VIN ending in 9818 ("Vehicle"). The moving party has provided the Declarations of John Eng and Jessela Amos to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Maximino Lemus Mendez and Francisca Rodriguez ("Debtors").

Movant argues Debtor has not made 1.95 pre-petition payments, with a total of \$1,874.20 in pre-petition payments past due. Declaration, Dckt. 16.

J.D. Power Valuation Report Provided

Movant has also provided a copy of the J.D. Power 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).

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 \$51,772.44 (Declaration, Dckt. 16), while the value of the Vehicle is determined to be \$48,750.00, as stated on the J.D. Power Valuation Report, which is more than the value as stated in Schedules A/B and D filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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.

11 U.S.C. § 362(d)(2)

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 to the court, and no opposition or showing having been made by Debtor or David Cusick (“the Chapter 13 Trustee”), the court determines that there is no equity in the Vehicle for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

Federal Rule of Bankruptcy Procedure 4001(a)(3) 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 that the court grant relief from the Rule as adopted by the United States Supreme Court. Movant makes this request on the grounds that Debtor has filed a Statement of Intention to surrender the Vehicle.

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 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 TD Bank, N.A., Successor in Interest to TD Auto Finance 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 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 2020 GMC Sierra 1500, VIN ending in 9818 (“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 waived for cause.

No other or additional relief is granted.