UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

February 4, 2014 at 1:30 p.m.

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1. 10-42389-E-13 CHANTEL BROWN
MKS-1 Peter G. Macaluso

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-7-14 [45]

NORTHSTAR CREDIT UNION VS.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

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 January 7, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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 Chapter 13 Trustee filed a response, and Debtor has timely filed an opposition to the motion. The movant has timely filed a reply.

The court's tentative decision is to deny the Motion for Relief from Stay without prejudice. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

NorthStar Credit Union ("NorthStar") seeks relief from the automatic stay with respect to an asset identified as a 2005 Nissan Altima, VIN ending in 65670 ("the vehicle"). The moving party has provided the Declaration of Regina Martynek to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. NorthStar moved for relief from stay pursuant to 11 U.S.C. § 362(d)(1) & (2).

DEBTOR'S OPPOSITION

The Debtor filed opposition to the motion, admitting that the Debtor did default in her plan payments. However, the Debtor asserts she filed a motion to modify the plan on December 6, 2013. Northstar was properly served with the motion to modify the plan, and failed to object to the plan before it was approved on January 16, 2014.

TRUSTEE'S RESPONSE

The Trustee provided a response to the motion, stating that Debtor has paid in a total of $6,280.00 to date and is current under the confirmed modified plan. Further, upon receiving the next payment due on January 25, 2014, the Trustee will disburse to this creditor a payment in the amount of $87.00.

MOVANT'S REPLY

Movant filed a reply on January 27, 2014, stating that the vehicle has no equity and that the vehicle is not necessary for an effective reorganization.

DISCUSSION

Relief Based on 11 U.S.C. § 362(d)(1)

The motion first requests relief pursuant to § 362(d)(1), asserting that the Debtor has defaulted in her plan payments, and that NorthStar is not adequately protected. The Martynek Declaration states that the Debtor has defaulted in plan payments; however, neither the Martynek Declaration, nor the motion itself states how many payments have been missed or what the post-petition arrears are. FN.1. It appears, based on the plan payments provided for in the original plan, and the Trustee's response to the motion, that the Debtor missed 5 plan payments, with a total of $460 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 $6,062.91, as stated in the Martynek Declaration, while the value of the asset is determined to be $5,000, as stated in Schedules B and D filed by Debtor.

FN.1. Counsel is reminded of Federal Rule of Bankruptcy Procedure 9013, which requires that "the motion shall state *with particularity* the grounds" on which the motion in made. (emphasis added). Here, neither the motion, nor the supporting declaration or exhibits tell the court how many payments have been missed or what the post-petition arrears are. While this information may be gleaned from the original plan and Trustee's response, it is not the court's job to fill in the gaps of counsel's motion.

The court maintains the right to grant relief from stay for cause when the 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 Debtor's opposition to the motion admits that the Debtor did default in her plan payments; in response, the Debtor filed a motion to modify the plan on December 6, 2013. Northstar was properly served with the motion to modify the plan, and failed to object to the plan before it was approved on January 16, 2014.

Modified Chapter 13 Plan

Under the Modified Chapter 13 Plan Northstar is to receive payments of $87.00 a month. Dckt. 36. The modified plan provides for monthly

installment payments an interest rate of 4.00% to repay a $5,000.00 claim. Both the Debtor's opposition the Trustee's response to the motion note that the Debtor is current on her payments under the modified plan. This reamortized Northstar's $5,000.00 claim to be paid under the Plan from $92.00 a month to the lower amount. The $92.00 monthly payment is consistent with the monthly payment amount using the Microsoft Excel Loan Calculator Program for a $5,000.00 loan to be repaid over five years at 4% interest. The Trustee did not object to confirmation on the basis that $87.00 a month payment was not sufficient to pay Northstar's claim.

Based on these facts, the court finds that NorthStar no longer has cause to seek relief from stay, so long as the Debtor continues to make her payments under the modified plan. While NorthStar may have had cause to seek relief from stay after the Debtor initially defaulted in her plan payments, NorthStar's "right" to assert that the Debtor was in default evaporated when the plan was amended and provides for the payment of this claim. The Motion asserts that the Debtor being in default of the prior confirmed plan constituted the cause. Further that Northstar had not received a payment since August 8, "2014" (which the court interprets to be a typographical error, and is intended to be 2013, see Martynek Declaration). FN.2.

FN.2. Though it is not alleged in the Motion, the Martynek declaration states that she is "informed and believes that the Vehicle is being used by the Debtor's son." Declaration ¶ 4, Dckt. 47. Federal Rule of Evidence 602 requires that a witness may testify to a matter "only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." A non-expert witness may provide opinion testimony if (1) rationally based on the witness's perception; (2) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of Federal Rule of Evidence 702. Fed. R. Evid. 701. There is nothing in the declaration to indicate why or how Ms. Martyek has either personal knowledge or proper lay person opinion testimony as to who is using the Vehicle. While making allegations on information and belief may be proper in a complaint or motion, such is not the basis for witness testimony. See 28 U.S.C. § 1746, which does not permit a witness to provide testimony under penalty of perjury to be "true," with the qualification that it is only "true" based on information and belief.

In addition, NorthStar has not presented any evidence to show that it is not being adequately protected. While the Martynek Declaration flatly concludes that NorthStar' interests in this 2005 model year Vehicle are not being adequately protected, it does not cite to any facts to support this conclusion. Quite to the contrary, the modified plan provides that NorthStar will receive monthly dividends as well as 4.00% interest on its secured claim. While Ms. Martynek makes the statement that "the Vehicle continues to depreciate...," she offers no testimony as to the amount and rapidity of the depreciation. Here, the court is considering a 9 model year old car. It is common knowledge that the depreciation for a vehicle is the greatest in the first three years and the older a vehicle gets the less depreciation. Possibly, if Ms. Martynek had provided an analysis of the

NADA valuations and the depreciation of this vehicle each year since 2005, it may well have shown little or no significant depreciation over the remaining approximate 18 months of the Modified Plan. The "cause" based on depreciation has not been shown (credible evidence provided) by Northstar.

The court finds that NorthStar has not shown sufficient grounds for relief from stay under § 362(d)(1).

Relief Based on 11 U.S.C. § 362(d)(2)

The motion also requests relief pursuant to § 362(d)(2), asserting that the Debtor does not have any equity in the property, and that the property is not necessary for reorganization.

The Debtor's Schedules, and plan, value the vehicle at $5,000; using this valuation, the Debtor has negative equity in the amount of $1,062.91. The Martynek Declaration also seeks to introduce evidence establishing the value of the asset at $4,300. Though the *National Automobile Dealers Association* ("NADA") pricing and information guide valuation is mentioned in the Martynek Declaration, it was not attached as an Exhibit until NorthStar filed its reply, and, in any event, it is not properly authenticated.

The court will *sua sponte* take notice that the NADA pricing guide may be within the "Market reports, commercial publications" exception to the Hearsay Rule, Federal Rule of Evidence 803(17), it does not resolve the authentication requirement, Federal Rule of Evidence 901. In this case, and because no opposition has been asserted by the Debtor on this point, the court will presume the Declaration of Regina Martynek to be that she obtained the NADA pricing guide valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

The NADA Guide provides that the "clean retail value" for the Vehicle is $6,550.00. Ms. Martynek provides not testimony as to why she had decided to reduce the NADA value by $1,000.00. This is more than the value stated by the Debtor. Accepting Northstar's evidence of value, the Debtor has a $340.00 equity in this vehicle. This fails to meet the first prong of the 11 U.S.C. § 362(b)(2) grounds.

If a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor 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).

The Debtor's opposition to the motion objects to the Martynek Declaration's assertion that the vehicle is being used by the Debtor's son on the grounds that Ms. Martynek lacks personal knowledge of the facts asserted, and that the statements are based on hearsay. Because the Martynek Declaration does not lay any foundation as to how Ms. Martynek became "informed" of these facts, the court is inclined to sustain the Debtor's objection to that statement.

However, in support of its reply, NorthStar filed a request for judicial notice of a declaration of the Debtor in support of her motion to obtain financing, filed on December 7, 2011, stating that the vehicle was being used by her son. FN.3. While the December 7, 2011 declaration is evidence that the Debtor's dependant uses the vehicle, it is not per se a showing that the vehicle is not necessary for an effective reorganization.

FN.3. Counsel would be well served to remember that a reply is not a "second chance" to correct omissions in one's motion and evidence, but is meant as a means to raise *new* arguments in response to an opposition. Evidence is support of the Motion, such as this declaration for which judicial notice is requested, should properly have been presented with the motion, not springing it on the Debtor seven days before the hearing. See Local Bankruptcy Rule 9014-1 for motion procedure.

The Martynek Declaration (not the motion), raises the additional argument that, as stated in the Debtor's December 6, 2013 declaration in support of the motion to modify the plan, the Debtor's plan will be funded solely through the Debtor's disability payments, and not through income from employment. See FN.1, above regarding the standard of Fed. R. Bankr. P. 9013. The Debtor's opposition did not address this point. First, the court will note that the second prong of the test under 11 U.S.C. § 362(d)(2) is not whether the property is generating income, the test is whether the property is necessary to an effective reorganization, which is a broader inquiry than mere income-generation. See 11 U.S.C. § 362(d)(2); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988). Second, the Debtor's December 6, 2013 declaration is not clear that the plan will be funded solely through disability payments; rather, the declaration states that the Debtor "ha[s] not returned to work" after a recent hospitalization, and that she has applied for disability. Dckt. 25. A Chapter 13 Plan does not have to be funded only from employment wages. 11 U.S.C. §§ 109(e), 101(3).

On these facts, the court is not satisfied that the vehicle is not necessary for an effective reorganization in this Chapter 13 case, if there had been a showing that there was no equity in the vehicle. However, it is a close call on this element. It is the Debtor's burden of proof on this point. 11 U.S.C. § 362(g)(1), (2). No declaration is provided by Debtor and the two pages of arguments stated in the opposition off little in citation to the record or files in this case.

Though the court does not now grant relief, adequate protection for Northstar is appropriate. As a condition of denying this Motion and to provide adequate protection to Northstar, the court provides if there is a default in the plan payments to Northstar and this order is modified, the court shall also order the immediate delivery of possession of the 2005 Nissan Altima, VIN ending in 65670 to a designated representative of Northstar. The Debtor having previously defaulted in the plan payments and, if it is actually the Debtor's son (though no son is listed as a dependant on Schedule I) who is in possession of the vehicle, requiring a further adversary proceeding to "force" the Debtor to turn over the vehicle is unreasonable. FN.4.

FN.4. The Debtor and her counsel should recognize that if a strategy is adopted that upon default the Debtor will feign that she does not have possession and control of the Vehicle, significant breach of fiduciary duty issues arise concerning this Vehicle which is property of the Estate for the Debtor and issues for counsel may arise concerning the pleadings filed in this case and representations made by and through counsel in those pleadings.

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.
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> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the motion is denied without prejudice.
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> **IT IS FURTHER ORDERED** that if there is a default in the monthly plan payments to Northstar Credit Union required under the First Modified Plan, Northstar Credit Union may file a motion to modify this order and grant relief from the stay. The Motion may be set for hearing on the court's regular law and motion calendar, with at least ten-days notice provided. Any opposition may be presented at the hearing.
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> **IT IS FURTHER ORDERED** that as a condition of denying this Motion and to provide adequate protection to Northstar, the court also conditions the denial of this motion on, if there is a default in the plan payments to Northstar and this order is modified, the court shall also order the immediate delivery of possession of the 2005 Nissan Altima, VIN ending in 65670 to a designated representative of Northstar.