

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

February 11, 2021 at 10:00 a.m.

| | | |
|----|--|--|
| 1. | <u>20-90479</u> -E-12 JOE MACHADO <u>JLG-2</u> David Johnston 1 thru 2 | MOTION FOR RELIEF FROM AUTOMATIC STAY 1-8-21 [58] |
|----|--|--|

**AMERICAN FARM MORTGAGE
COMPANY INC. 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—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 12 Trustee, parties requesting special notice, and Office of the United States Trustee on January 8, 2021. By the court’s calculation, 34 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 XXXXX. |
|---|

American Farm Mortgage Company, Inc. (“Movant”) seeks relief from the automatic stay

with respect to Joe Anthony Machado's ("Debtor") real property commonly known as 620 Denton Road, Hickman, California and certain personal property collateral, including, without limitation, all water and water rights, ditch and ditch rights, and irrigation equipment ("Property").

Movant did not provide a declaration to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant alleges that at the time of the filing, there was a pending foreclosure of the real property.

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 \$933,190.01 (Motion, at 2:20), while the value of the Property is determined to be \$2,600,000.00, 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.

Here, Movant argues that cause exists to terminate the automatic stay because:

- 1) The Debtor will not be able to confirm a plan; and
- 2) The Debtor's inaction and delays indicate that he filed his bankruptcy case in bad faith for the purpose of delaying his creditors.

Specifically, Movant argues that despite filing the Plan nearly two months ago, Debtor has not filed a motion to confirm the Plan or otherwise given notice of a hearing on confirmation of the Plan, which will not be completed within 45 after the filing of the Plan.

Movant points the court to *In re Three Tuns, Inc.* and *In re Novak* for the argument that courts have found that a debtor's repeated or prolonged failure to propose a plan may support a finding that cause exists for granting relief from the automatic stay. *In re Three Tuns, Inc.*, 35 B.R. 110, 111

(Bankr. E.D. Pa. 1983); *In re Novak*, 103 B.R. 403, 411-412 (Bankr. E.D.N.Y. 1989).

As to Movant's argument that Debtor filed the bankruptcy case in bad faith, Movant argues that at the time the Debtor filed his voluntary petition, Movant's foreclosure with respect to the Property was pending, and to date Debtor has failed to confirm a plan and will not be able to do so within the time required by 11 U.S.C. § 1224.

Additionally, according to Movant, Debtor has not complied with the terms of the proposed Plan because the plan requires Debtor to have listed the real property for sale and file an *ex parte* motion to employ a real estate broker both no later than November 30, 2020. Debtor listed the property on December 4, 2020 and has not yet filed an application to employ a real estate broker. Thus, Debtor is in breach of the plan terms and this inaction further evidences Debtor's bad faith in filing the bankruptcy case.

A review of the case docket shows that subsequent to the filing of this Motion, Debtor filed First Amended Plan and corresponding Motion to Confirm on January 12, 2021. Dckts. 66, 64. Filing a new plan is a *de facto* withdrawal of the pending plan. The hearing on the motion has been set for 10:30 a.m. on February 11, 2021.

A review of the proposed plan shows that Movant holding a secured claim is listed under Class 4, and provides the following treatment:

American Farm Mortgage Company, Inc., ("AFMC"), the holder of the claim in this class, will be paid the full amount of its claim in the sum of \$933,190 as of the Petition Date (Claim 11-1) (the "AFMC Claim"), plus interest on said sum at the rate of 6.25% per annum from and after the Petition Date until paid in full. In addition to the foregoing amounts, AFMC shall be entitled to add all of its post-petition attorneys' fees and costs and post-petition foreclosure fees and costs to the balance of the AFMC Claim (collectively, the "AFMC Post-Petition Fees and Costs"), which shall likewise accrue interest at the rate of 6.25% per annum until paid. The entire AFMC Claim, including all AFMC Post-Petition Fees and Costs, plus interest thereon in accordance with the terms of this paragraph, shall be paid in full no later than April 30, 2021 (the "AFMC Payment Deadline"). Notwithstanding the foregoing or any other terms of this Plan, if the Debtor materially defaults under the plan (which shall specifically include, without limitation, any failure to comply with the terms set forth in Part IV: Execution of the Plan), all amounts required to be paid to AFMC in accordance with this paragraph shall become immediately due and payable without notice or demand. receive cash equal to the allowed amount of its claim, together.

The AFMC Claim, including all AFMC Post-Petition Fees and Costs, plus interest thereon in accordance with the terms of this Plan, shall continue to be secured by the Farm and any other collateral granted as security thereof, which shall be based on the same lien and lien priority that existed immediately prior to the Petition Date, without the need for recording a modification of any deeds of trust or other security instruments. Except as expressly modified by the Plan, all other terms of the loan documents that evidence the AFMC Claim shall remain in full force and effect without change.

Proposed First Amended Chapter 12 Plan, Dckt. 66, at 5-6.

Moreover, on January 14, 2021, Debtor filed a Motion to Employ a real estate broker. Dckt. 70. The hearing on the motion has been set for 10:30 a.m. on February 11, 2021. The Declaration of William Clark Segerstrom, who is the President of Segerstrom Real Estate, Inc., doing business as Coldwell Banker Segerstrom (the “Broker”), testifies that the real property will be listed for \$2.1 Million dollars. Dckt. 72.

The court finds that Debtor in Possession having filed an Amended Plan, Movant listed as a creditor with a secured claim to be paid in full plus interest at a 6.25% rate, the real property having been listed, and a motion to employ a broker set for hearing on February 11, 2021, could be grounds to deny the relief requested.

At the hearing, **XXXXXXX**

| | | | |
|----|---------------------------------------|---|--|
| 2. | <u>20-90479</u> -E-12 | JOE MACHADO David Johnston | CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 7-9-20 [1] |
|----|---------------------------------------|---|--|

Debtor’s Atty: David C. Johnston

Notes:

Continued from 1/14/21 to be heard in conjunction with motion for relief from stay.

[DCJ-4] Motion of Debtor in Possession for Authority to Employ Real Estate Broker filed 1/14/21 [Dckt 70], set for hearing 2/11/21 at 10:30 a.m.

[JLG-1] Order dismissing as moot Objection to Confirmation filed 1/15/21 [Dckt 81]

| |
|--|
| The Status Conference is XXXXXXX |
|--|

FINAL RULINGS

3. [20-90703-E-7](#) **DANIELLE MENDENHALL** **MOTION FOR RELIEF FROM**
[RPZ-1](#) **Lauren Franzella** **AUTOMATIC STAY**
U.S. BANK NATIONAL **1-8-21 [17]**
ASSOCIATION VS.

Final Ruling: No appearance at the February 11, 2021 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 January 8, 2021. By the court's calculation, 34 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> |
|---|

U.S. Bank National Association ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2018 Jay Flight 324BDSW, VIN ending in 0182 ("Vehicle"). The moving party has provided the Declaration of Javier Gonzalez to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Danielle Marie Mendenhall ("Debtor").

Movant provides evidence that there are seven (7) pre-petition payments in default, with a pre-petition arrearage of \$2,118.38. Declaration, Dckt. 21.

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 \$35,381.11 (Declaration, Dckt. 21), while the value of the Vehicle is determined to be \$18,500, as stated in Schedules A/B and D filed by Debtor.

Based on the Debtor's Statement of Intention, the Debtor intends to surrender the Vehicle to Movant. Dckt. 1. A note appears in the Statement of Intention stating the following: "Debtor's husband has possession of the Jayco." Statement of Intention, at 51.

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.

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 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 Danielle Marie Mendenhall (“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 2018 Jay Flight 324BDSW, VIN ending in 0182 (“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.