

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

February 13, 2014 at 10:00 a.m.

1. [13-92112-E-7](#) **ALEXANDER NEGRETE** **MOTION FOR RELIEF FROM**
RMD-1 **Martha Lynn Passalacqua** **AUTOMATIC STAY**
 1-17-14 [[12](#)]
EVERBANK VS.

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

Correct Notice Not 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 17, 2014. By the court's calculation, 27 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 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 court's tentative decision is to deny the Motion for Relief from the Automatic 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:

The movant, EverBank, filed this Motion to for Relief pursuant to Local Rule 9014-1(f)(1). According to Local Rule 9014(f)(1), 28 days' of notice is required. However, EverBank filed this Motion on January 17, 2014, which is only 27 days' before the hearing. Incorrect service serves as an independent ground to deny the motion.

If the parties agree to waive service or a motion to shorten time is granted, the court may issue the following tentative ruling:

EverBank seeks relief from the automatic stay with respect to the real property commonly known as 2725 Dale Ave, Ceres, California. The moving party has provided the Declaration of Sonia Gaston 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 Gaston Declaration states that the Debtor has not made one (1) post-petition payment, with a total of \$1,084.52 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 property is determined to be \$139,233.89 (including \$129,325.43 secured by movant's first trust deed), as stated in the Gaston Declaration, while the value of the property is determined to be \$109,033.00, as stated in Schedules A and D filed by Debtor.

Relief Pursuant to 11 U.S.C. § 362(d)(1)

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 court determines that cause exists for terminating the automatic stay since the debtor has 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).

Relief Pursuant to 11 U.S.C. § 362(d)(2)

Once 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). Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow EverBank, and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

Because the moving party has established that there is no equity in the property for the Debtor and no value in excess of the amount of the creditor's claims as of the commencement of this case, the moving party is not awarded attorneys' fees for all matters relating to this Motion.

The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not 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 the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

No other or additional relief is granted.

AMERICAN HONDA FINANCE
CORPORATION VS.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, and Office of the United States Trustee on January 10, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay is granted. No appearance required.

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The Harrison Declaration states that the Debtor has not made 1 post-petition payment, with the amount of \$515.77 past due. The Harrison Declaration also asserts that the Debtor has only made a partial payment on 1 post-petition payment; however, the declaration does not provide the total amount of post-petition arrears. 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 \$16,912.83, as stated in the Harrison Declaration. The Harrison Declaration also seeks to introduce evidence establishing the value of the asset at \$15,825 through the *NADA Official Used Car Guide*. The evidence establishing the value of the asset through the *NADA Official Used Car Guide* is authenticated by the Harrison Declaration and attached as an Exhibit.

The Chapter 7 Trustee has filed a statement of non opposition to the 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 court determines that cause exists for terminating the automatic stay since the debtor has 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 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). Based upon the evidence submitted, the court determines that there is no equity in the asset for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the asset is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The Debtor was granted a discharge on June 3, 2013. Granting of a discharge to an individual under Chapter 7 lifts the automatic stay by operation of law. See 11 U.S.C. § 362(c)(2)(C). There being no automatic stay, the motion is denied as moot as to the Debtor. The Motion is granted as to the Estate.

The court shall issue a minute order terminating and vacating the automatic stay to allow American Honda Finance Corporation, and its agents, representatives and successors, and all other creditors having lien rights against the asset, 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.

The moving party has plead adequate facts and presented sufficient evidence to support the court waving the 14-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 the creditor 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 American Honda Finance Corporation, its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as a 2011 Honda CRV, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

IT IS FURTHER ORDERED that to the extent the Motion seeks relief from the automatic stay as to the debtor, who was granted a discharge in this case, it is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C).

IT IS FURTHER ORDERED that the fourteen (14) 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.

3. [13-91459](#)-E-11 LIMA BROTHERS DAIRY
WJS-1 Hagop T. Bedoyan

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
9-26-13 [[34](#)]

AMERICAN AGCREDIT, PCA VS.

CONT. FROM 1-16-14, 10-31-13, 10-10-13

Local Rule 9014-1(f)(2) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on September 26, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. That requirement was met.

Final Ruling: 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). Consequently, 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. The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Motion for Relief from the Automatic Stay is continued to 10:00 a.m. on March 6, 2014, to be heard in conjunction with the Chapter 11 Case Status Conference on the 3:30 p.m. calendar, pursuant to court order, Dckt. 136. No appearance at the February 13, 2014 hearing required.

American AgCredit, PCA ("Movant") seeks relief from the automatic stay with respect to an asset identified as the Dairy Herd and milk pool quota. The moving party has provided the Declarations of Teresa Rose, Eric Capron, and Steve Gallichio to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. Movant seeks relief pursuant to 11 U.S.C. § 362(d)(1), as cause exists because there is a potential for damage to the dairy herd from insufficient feed.

The Rose Declaration states that Debtor had borrowed total of \$2,561,128.14 from Movant. There have been post-petition payments received by milk check assignment, which may serve to decrease the total debt slightly.

The Capron Declaration states that Debtor had approximately 60 days of feed on hand on August 20, 2013. However, supplements needed to be purchased to generate feed mix with appropriate nutrition level (estimated cost of \$50,000). As of September 4, 2013, Debtor has failed to file a motion to appoint a broker to liquidate the herd.

The Gallichio Declaration states that he performed a Dairy Valuation. He found that additional feed will need to be purchased. Also, the Debtor did not have supplements such as oat hay, straw or corn stalks

for supplements with alfalfa. There are 3,403 animals which he valued at \$2,880,500.

Movant argues that it has been in contact with Debtor's Counsel and understood that the herd would be sold, but no motion to sell has been brought forward and then the September 11, 2013 status report by the Debtor also stated that Debtor expected to employ a broker to sell its livestock. However, no such motion has been filed to date.

PRIOR HEARING

Stipulation for Relief and Continued Hearing

The parties stated on the record a stipulation to grant the Motion and modifies the automatic stay the hearing to modify the stay to allow Movant to exercise its rights in the "Dry Cows," "bred heifers," "open heifers," "bucket calves (0-6 months)." For this relief, the 14-day stay of enforcement is waived. The hearing is continued as to the balance of the motion and collateral to 10:00 a.m. on October 31, 2013.

No additional documents have been filed to date either arguing for or against further relief from the stay.

DECEMBER 11, 2013 ORDER

On December 11, 2013, the court continued the hearing on the motion for relief from the automatic stay. Dckt. 81.

JANUARY 8, 2014 ORDER

On January 8, 2014, the court ordered that the hearing on the Motion for Relief be continued until February 13, 2014, to be heard at 10:00 am. Dckt. No. 98. It was further ordered that any opposition to the Motion be filed on or before January 30, 2014, and that any reply to opposition to the Motion be filed on or before February 6, 2014.

FEBRUARY 3, 2014 ORDER

On February 3, 2014, the court ordered that the hearing on the Motion for Relief be continued until March 6, 2014 at 10:00 a.m., and trailed to be heard with the Chapter 11 Case Status Conference on the 3:30 p.m. calendar. Dckt. No. 136. It was further ordered that any opposition to the Motion be filed on or before February 20, 2014, and that any reply to opposition to the Motion be filed on or before February 27, 2014.

Therefore, the motion is continued per that order.

4. [13-29351](#)-E-7 SHELBY SCANLAN
DBJ-1 Nikki Farris

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
1-10-14 [[55](#)]

DOUGLAS SHIELDS VS.

CONT. FROM 2-6-14

Local Rule 9014-1(f) (2) Motion - Final Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, Chapter 13 Trustee, and Office of the United States Trustee on January 10, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

Final Ruling: 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). Consequently, 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.

No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court.

The court's decision is to grant the Motion for Relief from the Automatic Stay. No appearance at the February 13, 2014 hearing is required.

PRIOR HEARING

Douglas T. Shields seeks relief from the automatic stay with respect to the real property commonly known as 1480 Oak Ridge Drive, Chico, California. The moving party has provided the Declaration of Douglas Shields to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Shields Declaration states that the Debtor has not made one post-petition payments, with a total of 807.81 in post-petition payments past due. The Motion asserts that relief from the stay should be granted pursuant to 11 U.S.C. § 362(d) (2) [based on no equity and not necessary for an effective reorganization], stating with particularity (Fed. R. Bank. P. 9013) the following grounds:

- A. Debtor is obligated to Movant under a promissory Note which is secured by the 1480 Oak Ridge Dr. Property.
- B. The obligation now owed on the Note is \$105,926.49.
- C. The Debtor defaulted in payments on the Note in December 2011 and has continued to default in each subsequent month though the date of the Motion.
- D. Movant is entitled to relief from the stay pursuant to 11 U.S.C. § 362(d) (2).

Motion, Dckt. 55.

Douglas Shields, the Movant, provides his testimony in support of the Motion. Declaration, Dckt. 57. In the declaration he provides testimony to authenticate the Note and Deed of Trust, provide information about the defaults, and to state the amount owing on the Note. No testimony is provided as to the value of the Property or to any other facts or circumstances concerning his status as a creditor or the impact of the non-payment of this obligation by the Debtor.

On its face, the Motion fails to allege a critical element for relief pursuant to 11 U.S.C. § 362(d)(2) - that there is no equity in the property for the Debtor or the estate. 11 U.S.C. § 362(d)(1)(A). Movant carries the burden of proof on this issue. 11 U.S.C. § 362(g)(1).

DISCUSSION

The Debtor commenced this bankruptcy case on July 15, 2013 as a Chapter 13 case in which Debtor sought to restructure her finances. The case was converted to one under Chapter 7 on December 3, 2013. Election to Convert by Debtor, Dckt. 42.

On January 13, 2014, the Chapter 7 Trustee issued her Report of No Distribution in this case and the Notice of Report of No Distribution was issued by the Clerk and served on January 14, 2014. Dckts. 61, 62. Implicit in this Report is a determination by the Trustee that there is no "equity" in the Property for the bankruptcy estate, so long as the Property is listed on the Schedules.

Debtor did list the 1480 Oak Ridge Dr. Property on Schedule A filed in this case. Dckt. 1 at 9. Schedule A lists the value to be \$216,000.00 and the claims secured by the Property to be (\$354,844.12). On Schedule C the Debtor does not claim any exemption in the 1480 Oak Ridge Dr. Property. *Id.* at 20.

On Schedule D the Debtor lists 3 different creditors having claims secured by the Property. *Id.* at 22. Schedule D does not indicate the priority of the three liens.

The court accepts the Trustee's Report of No Distribution as a statement that the Trustee does not oppose the relief requested in this Motion. While failing to allege an essential element for the relief, the Trustee has filled in that gap for Movant. The court grants relief from the automatic stay as to the estate.

However, the court will not stretch the pleadings to grant relief from the stay as to the Debtor, no such statement indicating concurrence with the grounds for relief under 11 U.S.C. § 362(d)(2).

Because this case has been converted from Chapter 13 to Chapter 7, the Debtor has received an extended period of time before objections to discharge may be filed and then a discharged entered. Entry of the discharge terminates the automatic stay as it applies to the Debtor and

property of the Debtor (which is not then property of the estate). 11 U.S.C. § 362(c)(1). Upon the entry of the discharge the automatic stay is replaced by the discharge injunction. 11 U.S.C. § 524(a).

No discharge can be entered in this case until after the March 13, 2014 deadline for filing objections to discharge expires. That will be eight months after the filing of this case. The deadline in a Chapter 7 case normally expires 90 days after the filing of the case.

From the allegations and testimony concerning non-payment, merely denying without prejudice the motion as to the Debtor would put Movant to the burden of (1) having to wait until after March 13, 2014 and the entry of the discharge injunction to proceed or (2) incurring the cost and expense of filing a new motion. Such does not seem equitable to the court under these circumstances.

Therefore, the court continued the hearing on this Motion to allow Movant to file and serve a supplement to the Motion which states all grounds with particularity for relief pursuant to 11 U.S.C. § 362(d)(2) and cite the court to specific evidence filed in support of motion or in the record in this case.

SUPPLEMENTAL PLEADINGS

On February 10, 2014, Creditor provided a supplemental motion for Relief from the Automatic Stay arguing cause to grant relief exists because there is no equity in the subject real property. Creditor states that the value of the property is \$216,000.00, as provided in the Debtor's Schedule A, and the debt secured by the property is 355,061.02.

ANALYSIS

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be \$355,061.02 (including \$91,949.90 secured by movant's first trust deed), while the value of the property is determined to be \$216,000.00, as stated in Schedules A and D filed by Debtor.

Once 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). Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).]

The court shall issue a minute order terminating and vacating the automatic stay to allow Douglas T. Shields, and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or

successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

Because the moving party has established that there is no equity in the property for the Debtor and no value in excess of the amount of the creditor's claims as of the commencement of this case, the moving party is not awarded attorneys' fees for all matters relating to this Motion.

The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not 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 the creditor 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 vacated to allow Douglas T. Shields, 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 1480 Oak Ridge Drive, Chico, California.

No other or additional relief is granted.