

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

Pursuant to District Court General Order 612, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through April 30, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

MODESTO DIVISION CALENDAR

April 23, 2020 at 10:00 a.m.

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|--|---------------|------------------------------------|
| 1. <u>20-90132-E-7</u> | ANTONIO LOPEZ | MOTION FOR RELIEF FROM |
| <u>ADR-1</u> | Pro Se | AUTOMATIC STAY |
| | | 4-2-20 <u>[33]</u> |
| JUAN RAMIREZ 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on April 2, 2020. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If

April 23, 2020 at 10:00 a.m.

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any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----
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| The Motion for Relief from the Automatic Stay is granted. |
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Juan Manuel Martinez Ramirez (“Movant”) seeks relief from the automatic stay with respect to the real property commonly known as 1325 Boulder Avenue, Modesto, California (“Property”). The moving party has provided the Declaration of Juan Manuel Martinez Ramirez to introduce evidence as a basis for Movant’s contention that Antonio Lopez (“Debtor”) does not have an ownership interest in or a right to maintain possession of the Property. It is asserted that the lease by which Debtor had occupied the Property was terminated. Movant presents evidence that it is the owner of the Property. Based on the evidence presented, Debtor would be at best a tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Stanislaus on November 12, 2019. Declaration. Dckt. 35.

Based upon the evidence submitted, the court determines that there is no equity in the Property for either 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 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, to exercise its rights to obtain possession and control of the Property, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

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 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 Juan Manuel Martinez Ramirez (“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 vacated to allow Movant and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 1325 Boulder Avenue, Modesto, California.

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.

GLENN THOMPSON 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, Lien Holder, parties requesting special notice, and Office of the United States Trustee on April 6, 2020. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Movant is required to specify which notice procedure is being used because that determines what type of response is required or permitted.

B) Notice.

(i) The notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition.

L.B.R. 9014-1(d)(3)(B).

The Motion for Relief from the Automatic Stay has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1.

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| The Motion for Relief from the Automatic Stay is XXXXXXXXXX . |
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Adolfo and Antoinette Cabello, Jerry and Soo Jung Hong, George and Lynn Gallegos, and Glenn Thompson ("Movants") seek relief from the automatic stay with respect to Sun-One LLC's ("Debtor in Possession") real property commonly known as Sims Road, Chinese Camp, Tuolumne County, California

APN 064-081-038-000 (“Property”). Movant has provided the Declarations of Roxana L. Stobaugh and Adolfo Cabello to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor in Possession has not made two (2) post-petition payments, with a total of \$12,500.00 in post-petition payments past due. Declaration, Dckt. 45. Movant also provides evidence that there are ten (10) pre-petition payments in default, with a pre-petition arrearage of \$62,500.00. *Id.*

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 \$600,000.00 (Declaration, Dckt. 45), while the value of the Property is determined to be \$4,390,000.00, as stated in Schedules B and D filed by Debtor.

Movant also filed the properly authenticated Land Appraisal Report prepared by Roxana L. Stobaugh. Exhibit 1. Dckt. 44. Based on the evaluation and analysis she conducted, the appraiser values the Property as of March 1, 2020 at \$290,000.00. Dckt. 43. This is significantly less than Debtor’s valuation.

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.

JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION 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 Debtors, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on March 24, 2020. 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 with respect to the bankruptcy estate and denied as moot as to the Debtor, the discharge having been entered in this case.

JPMorgan Chase Bank, National Association ("Movant") seeks relief from the automatic stay with respect to William Dean Carter and Michele Jenine Carter's ("Debtors") real property commonly known as 1211 Sonoma Avenue, Modesto, California ("Property"). Movant has provided the Declaration of Della Walker to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made three (3) post-petition payments, with a total of \$897.10 in post-petition payments past due. Declaration, Dckt. 36. Movant also provides evidence that there is one (1) pre-petition payments in default, with a pre-petition arrearage of \$320.21. *Id.*

Movant argues the Property is encumbered by a first deed of trust, also held by Movant, in the amount of \$225,000.00. After all liens on the Property are totaled, there is a total of \$23,026.32 in equity.

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 \$73,973.68 (Declaration, Dckt. 36), while the value of the Property is determined to be \$350,000.00, as stated in Schedules 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 Property for either 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 Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Prior Discharge

Debtor was granted a discharge in this case on March 16, 2020. Dckt. 30. Granting of a discharge to an individual in a Chapter 7 case terminates the automatic stay as to that debtor by operation of law, replacing it with the discharge injunction. *See* 11 U.S.C. §§ 362(c)(2)(C), 524(a)(2). There being no automatic stay, the Motion is denied as moot as to Debtor. The Motion is granted as to the Estate.

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 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.

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 JPMorgan Chase Bank, National Association (“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 vacated 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 1211 Sonoma Avenue, Modesto, 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 to the extent the Motion seeks relief from the automatic stay as to William Dean Carter and Michele Jenine Carter (“Debtors”), the discharge having been granted in this case, the Motion is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C) as to Debtor.

No other or additional relief is granted.

Debtor's Atty: Douglas B. Jacobs

Notes:

Set by order of the court dated 4/13/20 [Dckt 126]. Order to appear for John Reger, the Chapter 7 Trustee; Michael P. Dacquisto, counsel to the Chapter 7 Trustee; Stephen Oppewall, counsel for Essex Bank; Marie Landes, the named buyer in the Buy Sell Agreement; and Brant Bordsen, counsel for Marie Landes. Oral status reports may be given at the hearing.

The Status Conference is ~~XXXXXXXXXX~~

Currently, the court is reviewing a motion for attorney's fees filed by Essex Bank. DCN:SGO-1. The requested fees relate to a Motion to Sell Property of the Bankruptcy Estate which was heard by the prior judge and an order issued thereon.

The order approving the sale of property of the bankruptcy estate ("Sale Order," Dckt. 76) authorized the sale pursuant to 11 U.S.C. § 363(b), selling whatever interest the Bankruptcy Estate had in the property sold. The Sale Order does not provide for a sale free and clear of any asserted liens.

As reflected in the Civil Minutes from the hearing, in addition to other asserted grounds, Essex Bank "opposed" the sale, unless all of the proceeds were paid to the Bank based on the lien it asserted in said property. Civil Minutes, p. 1; Dckt. 74. In rejecting the objection unless paid position asserted by Essex Bank, the Bankruptcy Court analysis included:

Sixth, the court is not satisfied that the bank has established a colorable security interest in the property being sold.

The scope of the notice of lien's reach in the divorce case is outlined in Cal. Civ. Pro. Code § 708.410(a):

...

The court is unconvinced that this statute encompasses the property being sold. The divorce action is not a "cause of action . . . for money or property." It is an action for the dissolution of marriage.

...

The court sees nothing grounded in law or in fact that gives Essex Bank a security interest in any of the assets being sold. The bank has not established a colorable security interest in the art collection or firearms.

And, as an unsecured creditor, the bank will receive nothing from this sale because the \$186,000 domestic support obligation priority claim by the debtor's spouse must be paid ahead of other unsecured claims. POC 7; See 11 U.S.C. § 507(a)(1)(A) & (a)(1)(B).

Accordingly, the trustee may sell the art collection and firearms and pay the debtor's exemption. The sale will be approved pursuant to 11 U.S.C. §§ 363(b). The court will waive the 14-day period of Rule 6004(h).

Id., p. 3-5.

The Sale Order approving the sale authorizes the Trustee to sell the property on the terms of the Buy Sell Agreement which is attached as Exhibit A to the Sale Order (Dckt. 76). The basic terms of the Buy Sell Agreement ("Sale Agmt") are:

- A. Marie Landers ("ML") will pay \$20,000.00 to the Trustee for the property purchased. Sale Agmt ¶ 1.
- B. The Trustee shall obtain approval of the sale by the Bankruptcy Court. Sale Agmt ¶ 2.
- C. The sale is a sale of the "Estate's Interest" in the property. Sale Agmt ¶ 3.
- D. Sale Agmt ¶ 3 further provides:

The sale of Property under this Agreement is made on an "as is" and "where is" basis with no representations or warranties of any kind.

From a review of the Order and the Civil Minutes, it appears that the judge did not find the asserted lien colorable enough to derail the proposed sale of the property. However, there is no order for the sale of the property free and clear of any asserted lien. There is no "judgment" that Essex Bank does not have a lien. It appears that all that was ordered was something to the effect of:

I, the judge, do not see a basis for not authorizing to sell the Estate's interests, whatever they may be, to the buyer. The buyer has heard that Essex Bank is out there asserting a lien, and can proceed with knowledge thereof.

Appeal of Order Authorizing the AS-IS Sale of the Estate's Interests in the Property

After review of the Sale Order authorizing the As-Is sale of property of the Bankruptcy Estate pursuant to 11 U.S.C. § 363(b), Essex Bank appealed the Order and the Trustee advanced to defend the Order. On December 17, 2019, the Bankruptcy Appellate Panel for the Ninth Circuit issued a ruling and ordered that the "judgment" of the Bankruptcy Court was reversed. *Essex Bank v. Reger et al*, BAP NO. EC-18-1344 (2019), a copy of which is filed as Docket No. 99 in this Bankruptcy Case.

At the April 7, 2020 hearing on the Application for Fees by the Trustee's Counsel, disagreement was manifested by Essex Bank and the Trustee over what had been determined on appeal by the Bankruptcy Appellate Panel, a decision from which no further review by the Ninth Circuit has been sought by any party thereto.

At this juncture, after a review of the file, the Sale Order, the Bankruptcy Appellate Panel Decision ("BAP Decision" or "BAP Dec."), and other pending matters, an initial discussion of the Bankruptcy Appellate Panel Decision and the status of the litigation in this case is warranted.

The Bankruptcy Appellate Panel ("BAP Panel") starts off by stating that the order appealed from is the order "approving the **sale** of certain **personal property** of the estate to debtor's ex-spouse under **§ 363(b).**" BAP Dec. p. 2. The BAP Panel also states that the Bankruptcy Court "misapplied California law with respect to Essex Bank's lien under Cal. Civ. Code P. ("CCP") § 708.410. Accordingly, we REVERSE." *Id.*

The BAP Panel concluded that the appeal was not rendered moot under 11 U.S.C. § 363(m), or equitably moot. *Id.* at 8, 14.

The BAP Panel then discusses the proper application of California Code of Civil Procedure § 708.410(a). The BAP Panel states in the Decision:

It is undisputed, and the record establishes, that Essex Bank did everything required to obtain and perfect a lien under CCP § 708.410. . .

. . .

Thus, the lien appears to be prima facie valid.

Id. at 22. The Decision continues, stating that:

"The bankruptcy court could have ordered that the sale was subject to Essex Bank's lien. However, it went further and ruled, without citing any authority, that Essex Bank did not have a CCP § 708.410 lien [on the property sold].

The BAP Panel then concluded that the Bankruptcy Court abused its discretion in "ruling as a matter of law that Essex Bank did not have a CCP § 708.410 lien" and therefore "we must REVERSE the Sale Order." *Id.* at 23.

At this point, this court has to first question how the bankruptcy judge in issuing the sale order pursuant to 11 U.S.C. § 363(b) make a "ruling" that Essex Bank did not have a lien. Procedurally, an action to determine the extent, validity, or priority of a lien must be by an adversary proceeding. *See*, Fed. R. Bankr. P. 7001. While it is true that parties can waive that requirement and elect to proceed with that determination through a contested matter, there was no contested matter to determine the extent, validity, priority, or amount of any such asserted lien. Due Process at a minimum requires that there be a proceeding for a determination of a person's property rights before a judicial officer issues a judgment (which can include an order, see Fed. R. Civ. P. 54, Fed. R. Bankr. P. 7054, 9014) which purports to determine such interests.

The Order on the sale clearly is not one selling the property free and clear of the asserted lien as would be permitted under 11 U.S.C. § 363(f)(4), the lien being subject to *bona fide* dispute notwithstanding

there being no judgment having adjudicated that dispute. As clearly stated in the BAP Decision, nobody asserted that the sale was made free and clear of the asserted Essex Bank lien, but that it was just an As-Is sale of whatever interest the bankruptcy estate had in the property.

In looking at the bankruptcy judge's statements concerning the California Code of Civil Procedure § 708.410, he first said "the court is not satisfied that the bank has established a colorable security interest in the property being sold." BAP Dec., p. 3. This is not determinative language, but would appear to be merely, in connection with an assertion that the sale should be derailed because a creditor asserts a lien, the judge did not find it colorable to kill the sale. It does not say, "and the court determines that creditor has no lien in the property, and that the bankruptcy estate owns the property free and clear of such asserted lien." This, "no, you are not showing me enough to kill this 11 U.S.C. § 363(b) sale," are the Bankruptcy Court's closing comments that it is "unconvinced that this statute [C.C.P. § 708.410] encompasses the property being sold." *Id.* at 4.

Thus, one reading of the court's Sale Order, which expressly states that the sale is authorized pursuant to 11 U.S.C. § 363(b), As-Is, is that the buyer purchased with full notice that Essex Bank was asserting a lien on the property sold (and presumably on the proceeds from the sale of the property, if the C.C.P. § 708.410 lien also includes proceeds and is not limited only to the actual property to which it first attached). Such a buyer would make the qualitative decision of whether purchasing such property subject to an asserted lien, and the potential for future enforcement, is worth it in light of the "deal" they are getting in purchasing the property.

However, it appears that the Parties and the BAP Panel, for the appeal they were presented with, did not view it as such, and treated it as a "judgment" which determined that the personal property purchased was free and clear of any lien asserted by Essex Bank.

Status of Sales Order

At this juncture, it appears that there is no order authorizing the sale of the property by the Trustee. The BAP Decision states that the "Sale Order" is what the BAP Panel concluded "we must REVERSE." BAP Dec., p. 23. The BAP Order is that the judgment (which includes orders) is REVERSED.

If reversed, then there is no order authorizing the sale of the property to the Buyer. It appears that the Trustee needs to reset the Motion for further proceedings in light of the reversal. The sale order being reversed, it appears that the Buyer must return all of the property purchased to the Trustee. The Buyer being a party to the appeal was clearly on notice that any claim to have purchased or own the property pursuant to the Buy Sell Agreement was in question and now, based on the BAP Decision, Buyer has no right to. Correspondingly, the Trustee does not have any proceeds from an authorized sale, which appear to be the \$13,000.00 in monies being held by the Trustee that Essex Bank and the Trustee are intending to fight over.

APRIL 23, 2020 STATUS CONFERENCE

At the Status Conference, **XXXXXXXXXX**

FINAL RULINGS

5. 19-91102-E-7
[CAS-1](#)

TRACY NORRIS
Pro Se

MOTION FOR RELIEF FROM
AUTOMATIC STAY
1-27-20 [\[10\]](#)

BMW BANK OF NORTH AMERICA
VS.

Final Ruling: No appearance at the April 23, 2020 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 (*pro se*), Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on March 11, 2020. By the court's calculation, 43 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.

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| The Motion for Relief from the Automatic Stay is granted. |
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BMW Bank of North America ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 BMW 3 Series 328i Sedan 4D, VIN ending in 2392 ("Vehicle"). The moving party has provided the Declaration of Pamela Weems to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Tracy Lynn Norris ("Debtor").

Movant argues that there are four (4) pre-petition payments in default, with a pre-petition arrearage of \$3,276.00. Declaration, Dckt. 12.

The Debtor's Statement of Intention provides for surrender of the Vehicle. Dckt. 1.

Movant has also provided a copy of the Kelley Blue Book 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 \$42,111.83 (Declaration, Dckt. 12), while the value of the Vehicle is determined to be \$15,000.00, as stated in Schedules B and D filed by Debtor, which is less than the retail value as stated on the Kelley Blue Book Valuation Report.

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.

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 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 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 BMW Bank of North America (“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 BMW 3 Series 328i Sedan 4D, VIN ending in 2392 (“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.