

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Pursuant to District Court General Order 617, 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 June 1, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

May 12, 2020 at 1:30 p.m.

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| 1. | <u>20-20920</u> -E-13 MICHAEL MORRIS
<u>VVF-2</u> Peter Macaluso
HONDA LEASE TRUST VS. | MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
4-21-20 [62] |
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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, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 21, 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 13 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 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, -----.

The Motion for Relief from the Automatic Stay is granted.

Honda Lease Trust (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2017 Acura MDX, VIN ending in 2670 (“Vehicle”). The moving party has provided the Declaration of Adrian Lopez to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Michael Lamonte Morris (“Debtor”). Debtor is a lessee of the Vehicle, a lease which matured as of October 7, 2019.

If the court does not terminate the stay, Movant in the alternative requests that the court order adequate protection payments and that the Creditor be allowed to amend its Proof of Claim to collect deficiency amount, if any, that may exist on Debtor’s account after the sale of the Vehicle.

Movant argues Debtor has not made 4.46 post-petition payments, with a total of \$4,083.17 in post-petition payments past due. Declaration, Dckt. 65. Movant also provides evidence that there are two (2) pre-petition payments in default, with a pre-petition arrearage of \$1,829.20. *Id.* According to Movant, instead of purchasing the Vehicle, Debtor is attempting to finance the “Purchase Option” through the Plan.

Movant has also provided a copy of the NADA 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

The Vehicle is listed on Schedule A/B by the Debtor as having a value of \$22,000.00. Dckt. 12 at 4. The Vehicle is described as being in “Fair Condition” and having 92,383 miles on it. The Lease Agreement filed as Exhibit 2 (Dckt. 66) with the Motion is dated October 7, 2016. As of the February 19, 2020 filing of this bankruptcy case, three years and five months had passed from the date of the lease. Spreading the 92,383 over the three and 5/12th years, that would average 27,044 miles a year, which is more than twice the average mileage per year that this court sees consumers putting on vehicles.

Debtor lists Movant as having a secured claim in the amount of (\$28,816.91) on Schedule D. *Id.* at 11.

Schedule G is one in which a debtor lists executory contracts and unexpired leases. None are listed on Schedule G filed by Debtor (*Id.* at 19), which is consistent with Movant asserting that the lease expired in 2019. ^{FN. 1}

FN. 1. As noted in the Motion, the Ninth Circuit Court of Appeals has ruled that an option is not automatically an “executory contract,” but it must be determined whether there is actually performance on both sides required if the option is exercised (and not merely the payment of the seller taking the

money). *Unsecured Creditors' Committee v. Southmark Corporation*, 139 F.3d 702, 706 (9th Cir. 1998), applying the classic Countryman definition.

The NADA valuation report provided by Movant states a “Clean Retail” value of \$26,750. However, the mileage for such valuation is stated to be only 47,500 miles, approximately half the actual miles stated by Debtor and in showroom floor retail sale ready, and not the “Fair” condition of a three and one-half year old vehicle with almost 100,000 miles on it. Using the NADA valuation guide by Movant, the clean retail for the Vehicle with the actual mileage would be \$21,400, indicating that Debtor’s valuation may indicate that the Vehicle is in near showroom ready condition, with no damage, deferred maintenance, or other repairs. ^{FN. 2}

FN. 2. <https://www.nadaguides.com/Cars/2017/Acura/MDX/Utility-4D-2WD-V6/Values>

The proposed Plan in this case merely provides for Movant in Class 2 as a creditor having a secured claim in the amount of \$29,816.91, which is to be amortized over 60 months with 7% interest, yielding a monthly payment of \$591.00. The Plan does not provide for Debtor exercising an option to purchase the Vehicle.

In paying \$30,000 for a vehicle worth \$20,000 (the court rounding the numbers), plus 7% interest, Debtor appears to be paying Movant a significantly better result than if Movant took possession of and sold the vehicle for maybe \$13,000 at auction.

With monthly payments of \$591.00, Movant would recover the present retail value of the vehicle in thirty-four (34) months and recover the projected auction value in twenty-two (22) months.

Movant has also filed an Objection to Confirmation of the Plan. Dckt. 39. A significant part of the Objection appears to be that Debtor has failed to make any arrangement to purchase the Vehicle, but has merely imposed a purchase in a plan.

Debtor’s Plan requires monthly plan payments of \$6,200. Dckt. 13 at 1. For the Debtor’s residence, the plan requires a \$770 a month cure payment for a (\$46,118.39) pre-petition arrearage and (\$2,639) for the post-petition monthly payment. Movant is the only other creditor to be paid through the plan, with a projected 0.00% dividend for creditors with unsecured claims. *Id.* at 5.

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).

Here, using the Debtor's statement of value of \$22,000.00, there is a significant lack of value for Creditor's claim, with the value of the Vehicle (at retail) being approximately 55% of the amount of Movant's claim (based on purchase obligation if the option is exercised).

The Chapter 13 Trustee has also filed an Objection to Debtor's Plan, asserting that Debtor was \$12,699.46 in default on Plan payments as of May 6, 2020. Objection, Dckt. 86 and Declaration, Dckt. 88. The Trustee also notes that the court has modified the stay to allow the landlord for the property at which the Debtor (or his limited liability company) operates a business from which Debtor derives his income proceed in state court to obtain possession of that commercial property.

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.

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 Honda Lease Trust ("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 2017 Acura MDX,

VIN ending in 2670 (“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.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on March 18, 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). The defaults of the non-responding parties and other parties in interest are entered.

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

Toyota Motor Credit Corporation, Servicer for Toyota Lease Trust ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2019 Toyota Tacoma, VIN ending in 2926 ("Vehicle"). The moving party has provided the Declaration of Rahnae Spooner to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Jesse James Foster ("Debtor"). Debtor is the lessee of the Vehicle.

Movant argues Debtor has not made two post-petition payments, with a total of \$745.80 in post-petition payments past due. Declaration, Dckt. 34. Movant also provides evidence that there are seven pre-petition payments in default, with a pre-petition arrearage of \$2,610.30. *Id.*

TRUSTEE'S NON-OPPOSITION

Trustee has no opposition to the relief requested. Trustee's April 30, 2020 Docket Entry Statement.

DEBTOR APPEARANCE AT HEARING

The Debtor appeared at the hearing with his proposed counsel who is to substitute in this case. Debtor stated that they wanted to keep the Vehicle, and their attorney would promptly work that out with the Movant. A brief continuance was requested.

Debtor's Opposition

On May 5, 2020, Debtor's counsel filed an Opposition, stating that a further continuance is requested to allow Debtor to "provide Creditor with the requested Proof of Insurance on the leased 2019 Toyota Tacoma." Dckt. 72.

On May 8, 2020, Debtor filed a Declaration in support of the Opposition stating that as of May 5, 2020, he had obtained insurance for the Vehicle. Dckt. 74. Proof of Insurance in the form of a Memorandum of Insurance from GEICO was filed as Exhibit A. Dckt. 75.

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 \$25,686.90 (Declaration, Dckt. 34), while the value of the Vehicle is determined to be \$25,850.00, as stated in Schedule B 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 original hearing on the Motion was conducted on April 30, 2020. The continued hearing conducted on May 12, 2020 - two weeks later.

Debtor has now provided proof of insurance.

The other grounds stated in the Motion are that Debtor is in default in the payments due on the obligation for the months of July 2019 through February 2020 (as of the February 7, 2020 filing of this bankruptcy case). Motion, p: 2:1-6; Dckt. 32. Debtor incurred this obligation in April 2019.

This is a Chapter 7 bankruptcy case. At a prior hearing, Debtor, while in *pro se*, expressed an understanding that Chapter 7 may not be the bankruptcy relief he needed and was seeking counsel. Debtor has now obtained counsel.

At the hearing, counsel for the Debtor stated **XXXXXXXXXX**

~~_____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.~~

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 Toyota Motor Credit Corporation (“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 2019 Toyota Tacoma, VIN ending in 2926 (“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.~~