

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein

Chief Bankruptcy Judge

Sacramento, California

June 10, 2014 at 1:30 p.m.

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1. [12-40029](#)-C-13 CARLOS BECKNELL CONTINUED MOTION FOR RELIEF
 APN-1 Dale A. Orthner FROM AUTOMATIC STAY
 4-18-14 [[73](#)]

 SOUTH PARK TOWNHOUSE
 ASSOCIATION VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 18, 2014. Twenty-eight days' notice is required. That requirement was met.

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 Motion for Relief from the Automatic Stay is granted. 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:

May 22, 2014 Hearing

At the hearing held May 22, 2014, the court continued the matter to June 10, 2014. The court ordered Debtor's Counsel to meet and confer with Mvant's Counsel on or before May 28, 2014 to discuss Debtor's intention regarding continued possession of the property and the method for curing the arrearage.

As of June 5, 2014, not supplemental pleading on the state of this Motion appears on the docket. Therefore, the court's tentative decision to grant the Motion for Relief remains unchanged.

June 10, 2014 at 1:30 p.m.

Motion for Relief

South Park Townhouse Association seeks relief from the automatic stay with respect to the real property commonly known as 5915 Bamford Drive, Sacramento, California. The moving party has provided the Declaration of Peg Hart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Peg Hart Declaration states that the Debtor has not made 17 post-petition payments, with a total of \$4,061.49 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 \$127,314.49 (including \$4,061.49 secured by movant's Homeowner Association lien), as stated in the Peg Hart Declaration, while the value of the property is determined to be \$77,000, as stated in Schedules A and D filed by Debtor.

Chapter 13 Trustee

Filed a statement of non-opposition on May 6, 2014.

Discussion

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).

The court shall issue a minute order terminating and vacating the automatic stay to allow South Park Townhouse Association, 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.

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 South Park Townhouse Association, 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 5915 Bamford Drive, Sacramento, California.

2. [11-33247](#)-C-13 GWENDOLYN GUEVARA
DVW-1 Timothy J. Walsh

MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-18-14 [[52](#)]

21ST MORTGAGE CORPORATION
VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 18, 2014. Fourteen days' notice is required. That requirement was met.

Tentative 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. If any of these potential respondents appear at the hearing and offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. 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:

21st Mortgage Corporation seeks relief from the automatic stay with respect to the real property commonly known as 461 Meadows Drive, Vallejo, California. The moving party has provided the Declaration of Robert Bonczek to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

In November 2012, Debtor entered into a Loan Modification Agreement with Movant's predecessor-in-interest, GMAC Mortgage. The Loan Modification Agreement was approved by the court on January 29, 2013. The Modification evidences Debtor's promise to make monthly principal and interest payments of \$1,112.75, until all principal and interest is paid in full.

The Bonczek Declaration states that the Debtor has not made 10 post-petition payments (August 2013, through May 2014), with a total of \$15,697.80 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 \$163,242, while the value of the property is determined to be \$150,000, as stated in Schedules A and D filed by Debtor.

Chapter 13 Trustee

Filed statement of non-opposition to the Motion on May 22, 2014.

Discussion

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).

The court shall issue a minute order terminating and vacating the automatic stay to allow 21st Mortgage Corporation, 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 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 21st Mortgage Corporation, 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 461 Meadows Drive, Vallejo, California.

No other or additional relief is granted.

3. [14-24647](#)-C-13 GRANT/LORI HANEY
SW-1 Eric John Schwab

MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-22-14 [[17](#)]

ALLY FINANCIAL, INC. VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 22, 2014. Fourteen days' notice is required. That requirement was met.

Tentative 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. If any of these potential respondents appear at the hearing and offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. 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:

Ally Financial Inc. seeks relief from the automatic stay with respect to an asset identified as a 2010 Chevrolet Equinox, VIN ending in 2046. The moving party has provided the Declaration of Brent Van Tassel to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Tassel Declaration states that the Debtor has not made 1 post-petition payment, with a total of \$485.67 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 asset is determined to be \$22,380, as stated in the Tassel Declaration, while the value of the asset is determined to be \$17,004, as stated in Schedules B and D filed by Debtor.

Chapter 13 Trustee

Filed a statement of non-opposition to the Motion.

Debtor's Response

Debtor has no opposition to the court granting the Motion and will communicate with Movant to arrange repossession.

Discussion

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).

The court shall issue a minute order terminating and vacating the automatic stay to allow Ally Financial Inc., 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.

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 Ally Financial Inc., 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 2010 Chevrolet Equinox, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

No other or additional relief is granted.

4. [12-40948](#)-C-13 STEVEN/GINA SERIO
APN-1 W. Steven Shumway

MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-8-14 [[63](#)]

HYUNDAI LEASE TITLING TRUST
VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 8, 2014. Twenty-eight days' notice is required. This requirement was met.

Final 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 Debtor 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 as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The court's decision is to grant the Motion for Relief from the Automatic Stay. No appearance is required. The court makes the following findings of fact and conclusions of law:

Lessor, Hyundai Lease Titling Trust seeks relief from the automatic stay with respect to an asset identified as a 2013 Hyundai Elantra, VIN # ending in 5147. The moving party has provided the Declaration of Omowunmi Olowoyeye to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Olowoyeye Declaration provides that Debtors and Lessor executed a written lease agreement on September 8, 2012. Pursuant to the terms of the lease, Debtor is obligated to pay Lessor \$315.05 each month. As of the date of Movant's Motion, Debtors were past due for a portion of January 2014, and the February, March, and April 2014 monthly payments due and owing.

Chapter 13 Trustee

Filed a statement of non-opposition to the Motion on May 12, 2014.

Discussion

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).

Lessor will be permitted to pursue state remedies to regain possession. The court shall issue a minute order terminating and vacating the automatic stay to allow Hyundai Lease Titling Trust to enforce its rights and remedies under the parties' original contractual agreement, and thereby allow Hyundai Lease Titling Trust to gain immediate possession of the property and dispose of the same in a commercially-reasonable sale.

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 Hyundai Lease Titling Trust to pursue nonbankruptcy remedies with regard to the property commonly known as 2013 Hyundai Elantra.

VS. SABAH FRANCIS

Local Rule 9014-1(f)(2) Motion. Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 24, 2014. Fourteen days' notice is required. That requirement was met.

Tentative 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. If any of these potential respondents appear at the hearing and offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. 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:

MARCH 11, 2014 HEARING

The hearing on this matter was continued from March 11, 2014. At the previous hearing, the Debtor appeared and stated that he sought to oppose the Motion. Debtor informed the court that he planned to proceed with a plan to provide for a sale of the business and payment of the claim of Sabah Francis ("Movant"). Civil Minutes, Dckt. No. 33. Debtor stated that he intended to proceed with a plan in good faith.

As addressed below, however, the court has identified some serious issues relating to the Debtors conduct in this case and his prior case which issues put the Debtors credibility and good faith into question. The court afforded Debtor the opportunity to address such issues, as appropriate, in connection with the opposition he asserts to the present Motion. The court set a briefing schedule to allow additional time for Debtor to file and serve an opposition, and for Movant to file and serve any replies to Debtor's opposition.

REVIEW OF THE MOTION

Sabah Francis ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as **10144 Coloma Road, Rancho Cordova**, California. The moving party has provided the Declaration of Sabah Francis to introduce evidence which establishes that the Debtor is a tenant at the subject commercial real property.

Declarant asserts that the current monthly lease obligation is \$2,742.74, plus a "CAM" assessment of \$1,054.20, for a total of \$3,796.94. Declarant states that prior to filing his voluntary petition, Debtor was in default regarding the rent payment back to March 2009. Debtor has not paid the post-petition lease payment for February 2014. Further, as of November 30, 2013, liability on the property was cancelled. Under the terms of the lease, Debtor is to provide liability insurance, insuring the landlord and tenant for injury or death in the amount of \$1,000,000 and property damage in the amount of \$500,000.

Movant requests relief from the automatic stay, pursuant to 11 U.S.C. § 362(d)(1) to obtain a judgment in state court for possession of the property and the right to execute on the state court judgment.

Chapter 13 Trustee Response, filed 02/27/14 (Dckt. 28)

Chapter 13 Trustee supports granting the Motion for Relief from the Automatic Stay and asserts that the Chapter 13 petition was filed solely to delay movant from pursuing an unlawful detainer action. Trustee makes this assertion based on the following:

1. Debtor's plan (Dckt. 13) provides for Movant as "PS Property Management" in Section 3.02 as an executory contract or unexpired lease. In Section 1.01 of the plan, Debtor proposes a plan payment of \$150.00 and in section 1.02 states that Debtor will pay all proceeds from the sale of the business within 90 days.

Section 6.01 provides the following treatment for Movant's claim: "Debtor is selling the business and will pay all claims in full from the proceeds within 90 days of confirmation." Section 6.02 states "Debtor to remit on-going lease payment until sale is funded and the arrears will be paid with the proceeds."

2. Debtors current plan provides for no unsecured creditors and all other claims are paid outside of the plan, except for attorneys' fees. Debtor has a prior Chapter 13 case with a discharge (10-30079) paying 3.76% on \$357,309 in unsecured claims. The current plan includes property on San Juan Avenue in Class 4, it is a duplex that was to be surrendered in the previous case. Debtor has provided no information concerning rental income for the property in either case.
3. Debtor's Schedules I & J and Business Income and Expenses (Dckt. 12) reflect a monthly rental expense for their business of \$1,873 and insurance of \$150.00. Debtor's provide for their business on Schedule B as "Happy Laundry" and state that "Business has been listed for sale \$84,900," "Value of asserts (wholesale/liquidation) \$15,000, on-going entity value \$45-65k."

DISCUSSION

Movant has provided a copy of the lease agreement evidencing that Movant is the landlord of 10144 Coloma Road, Rancho Cordova, California. (Exh. A, Dckt. 25, P. 11). The lease was originally entered into between Movant and Ira Lee. Evidence of assignment of the lease from the original tenant through to Debtor is provided. On Page 19 of Docket 25 (Exh. A), Movant provides a copy of lease assignment between Ira Lee and Michelle Lee, as lessees, and Bao Nguyen and Nhung Nguyen, as assignees. Assignment to Debtor is evidenced by Page 16 of Docket 25 (Exh. A), where Movant provides an "Assignment of Lease" from Bao Nguyen and Nhung Nguyen to Debtor. Movant's evidence establishes that at the time Debtor filed for bankruptcy, Debtor was the tenant at 10144 Coloma Road, Rancho Cordova, California and Movant was the landlord. The liability insurance modification was added into the lease when Debtor's predecessor was tenant. (Exh. A, Dckt. 25, P. 15).

In support of Movant's assertion that the liability insurance was cancelled as of November 2013, Movant provides the court with renewal statement from American Economy Insurance Company, addressed to Debtor at the business address. (Exh. C, Dckt. 25). The renewal statement was prepared on October 16, 2012 and is for the policy period 11/30/2012 through 11/30/2013. It states that the total premium due for the policy term is \$2,151.00. It states that Debtor will be billed through the customer account and that a billing statement will be sent shortly. It does not support Movant's assertion that the insurance was cancelled, but is merely a notice of payment due. In the Declaration of Sabah Francis, Sabah Francis declares that the insurance was cancelled as of November 30, 2013 and cites to the renewal statement in support of the testimony.

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). Here, Debtor has not made the post-petition rent payment (Exh. B, Dkt. 25) and the Francis Declaration provides that Debtor's pre-petition default reaches back to March 2009. The Francis Declaration included testimony that Debtor was in breach of the lease agreement for allowing liability insurance to lapse at the time of the filing of the Motion. Evidence was presented that the Debtor defaulted in the post-petition payments which would be due under the lease. The court shared the Trustee's concern that Debtor merely filed this bankruptcy to halt Movant from exercising state law remedies. Debtor's plan is shallow and is merely an effort to seek shelter in bankruptcy court to the detriment of its landlord.

Prior Bankruptcy Case

The Debtor was part of a prior bankruptcy case commenced on July 29, 2010. Grigor Movseyan and Anahit Movseyan, Bankr. E.D. Cal. 10-40079 ("First Case"). The debtors in the First Case completed their Chapter 13 Plan and received a discharge on December 10, 2013. Discharge Order, First Case Dckt. 93.

Current Proposed Chapter 13 Plan

The Chapter 13 Plan proposed by the Debtor with the assistance of

his counsel has the following basic provisions:

- A. Monthly Plan Payments.....\$150.00
 - 1. Additional Payments From Sale of Business Within 90 Days of Confirmation.
- B. Term of Plan.....36 Months
- C. Legal Fees to be Paid Counsel for Debtor
 - 1. \$4,500.00
 - 2. Paid Prior to Filing.....\$1,500.00
 - 3. Paid Through Plan.....\$3,000.00
- D. Monthly Administrative Expenses.....(\$135.00)
- E. Class 1 Secured
 - 1. None
- F. Class 2 Secured Claims
 - 1. None
- G. Class 3 Secured Claims
 - 1. None
- H. Class 4 Secured Claims
 - 1. US Bank (Mcneely Way).....(\$1,176.35)
 - 2. Bank of America (San Juan Ave)...(\$1,328.45)
- I. Class 5 Priority Unsecured Claims
 - 1. None
- J. Class 6 Designated Unsecured Claims
 - 1. None
- K. Class 7 General Unsecured Claims
 - 1. 100% for Projected \$1.00 Total Claims
- L. Additional Provisions
 - 1. Debtor to Remit On-Going Lease Payments Until Sale is Funded and The Arrears Will be Paid With The Proceeds.

Plan, Dckt. 13.

On the Chapter 13 Statement of Current Monthly Income (Form 22C),

the Debtor reports that in the six months prior to January 2014 (July - December 2013) the Debtor averaged \$10,255.67 in gross income from his business. Dckt. 12. No income is stated for the Debtor's spouse. Though a substantial monthly gross income, after payment of business expenses and the 707(b) IRS allowed deductions, the Debtor reports a negative monthly disposable income of (\$847.33).

On Schedule B Debtor lists personal property assets with a total value of \$70,509.01. *Id.* at 12-14. All but the following three assets are of di minimus value:

- A. Happy Laundry Business.....\$65,000.00
 - 1. Schedule B States That The Business Has Been Listed For Sale at \$84,900.
 - 2. The Liquidation Value of the Assets of the Business are.....\$15,000.00
 - 3. The On-Going Entity Value is.....\$45-\$65,000
- B. 1997 F150 Pickup.....\$ 1,500.00
- C. 2002 Mercedes ML.....\$ 3,000.00

While stating on the Chapter 13 Statement of Current Monthly Income that the average monthly gross income from the business for the six months prior to the commencement of the case was \$10,255.67 (totaling \$61,534.01), on Schedule I the Debtor states that the gross income from the business for the 12 months prior to filing was \$61,000.00. *Id.* at 23. In response to Question 18 of the Statement of Financial Affairs the Debtor states that he has operated this business since 2007 to the present. *Id.* at 31.

On the Income and Business Expense Statement included as part of Schedule I, the Debtor lists the \$61,000.00 in income for the prior 12 months, which he then averages to be \$6,000.00 a month. (Quite possibly the Debtor and counsel may have been confused with this form requiring a 12 month income total and monthly average as opposed to the 6 month period on Form 22C.) *Id.* at 23. The Debtor then continues to state under penalty of perjury that the only expenses for the business (a coin operated laundry) are the following:

- A. Rent.....(\$1,873.00)
- B. Insurance.....(\$ 100.00).

Id. It is hard to believe that a coin operated laundry, open to the public, has no other expenses than the two stated under penalty of perjury by the Debtor. There are not cleaning supplies to maintain the premises from the mass of humanity that comes in to was their clothes at a coin operated laundry. There are no trash expenses. There are no repairs. There are no utility expenses for running the washers, dryers, and lights. There are no expenses for water or sewer. The court does not find this statement under penalty of perjury credible or truthful. FN.1.

FN.1. It needs to be noted that this bankruptcy case was filed on January 31, 2014. The Schedules and Statement of Financial Affairs were not filed

until February 13, 2014. The Debtor had sufficient time, wrapped in the protective cocoon of the automatic stay, to review and accurately complete the pleadings filed in this case under penalty of perjury.

On the Statement of Financial Affairs the Debtor States Under Penalty of Perjury that,

- A. His Income From Employment or Operation of Business has been,
 - 1. None for 2014 Year to Date
 - 2. None for 2013
 - 3. None for 2012
- B. Income From Other Than Employment or Operation fo Business has been,
 - 1. None for 2014 Year to Date
 - 2. None for 2013
 - 3. None for 2012

Id. at 28.

In reviewing the proposed Chapter 13 Plan the court notes that it includes Bank of America, N.A. as a creditor for a debt secured by the San Juan Ave. Property. This claim was provided for in the confirmed plan in the prior case. 10-40079 Dckt. 23. The Plan provided that the property was surrendered to the Bank and the automatic stay terminated.

The fact that a lender may not have foreclosed would not in and of itself warrant one raising their eyebrows, but there are more strange circumstances relating to this claim and the prior case. The Chapter 13 Plan in the First Case was confirmed based on the Debtor having only \$450.00 a month of projected disposable income. The income from the business was stated under penalty of perjury to be only \$30,660.00 a year as stated on the confirmed First Amended Plan confirmed in that case. First Case Dckt. 23. On Schedule I the debtors in the First Case stated that the monthly gross income from the business was \$7,800.00 and on Schedule J the expenses were (\$5,245.00). *Id.* at 32, 33. After deducting all of the reasonable expenses on Schedule J, the debtors in the First Case had only \$450.00 a month in projected disposable income to fund a plan.

On August 8, 2011, six months after the court confirmed the Plan in the First Case, the debtors filed a motion for authorization to obtain post-petition secured credit in the form of a loan modification of the debt secured by the San Juan Ave. Property. Motion, First Case Dckt. 51. Though only having \$450.00 of projected disposable income to fund the Amended Chapter 13 Plan, the debtors in the First Case sought authorization to take on an additional monthly payment of \$1,358.41 rather than surrender the San Juan Ave. Property.

The motion makes no statement as to how the debtors in the First Case could afford this additional amount, other than to state, "The

agreement will not have any direct impact on the estate, the Trustee, or any other secured creditor in this case, and/or any Discharge that the debtors may receive." *Id.*

Not surprisingly the motion to obtain post-petition credit caught the objection of the Chapter 13 Trustee. First Case Dckt. 57. It was based on there being no ability of the debtors in the First Case to pay the additional monthly expense based upon the financial information theretofore provided under penalty of perjury by the debtors.

The debtors in the First Case filed a Reply to the Trustee's Opposition. No declaration was provided as to the asserted facts, but the debtors in the First Case merely had their attorney advance an argument. First Case Dckt. 60. Counsel for the debtors argued that the debtors were planning on renting the property to other family members, projecting increased monthly rental income of \$1,400 to \$1,500 a month.

The court denied the motion for post-petition credit, citing that the debtors in the first case provided no evidence as to any change in their income or their current finances which was generating sufficient additional income to undertake this obligation. The court noted that if the debtors in the First Case intended to proceed with the modification, then they would have to amend their plan. Civil Minutes, First Case Dckt. 63.

No further motion to obtain post-petition financing was filed with the court in the First Case and no provision was made for payment of any monies to Bank of America, N.A. on its claim in that case.

The proposed Plan in the Debtor's current case provides for claim of Bank of America, N.A. which is secured by the San Juan Ave. Property as a Class 4 claim for which there is no pre-petition arrearage. The monthly payment to be made by the Debtor to Bank of America, N.A. on this claim is \$1,328.45. Proposed Plan, Dckt. 13. This is almost exactly the same amount as stated in the proposed loan modification in the First Case which was denied by the court. (Some minor difference for property tax and insurance escrow impounds is reasonably expected.)

This all may be innocent, or it may be that the debtors in the First Case willfully and intentionally obtained the post-petition creditor without obtaining authorization from the court. Further, it may be that they did not seek authorization in order to hide their true finances. In light of the inconsistent statements under penalty of perjury concerning the Debtor's finances in this case, the court cannot merely reject the latter alternative.

The Chapter 13 Trustee is directed to bring this matter to the attention of the U.S. Trustee. To the extent that the U.S. Trustee or the Chapter 13 Trustee determine any action is warranted, such will be their independent exercise of discretion. To the extent that they determine no action is warranted, it will be based on the information they deem appropriate to make such determination.

OPPOSITION BY DEBTOR

Debtor opposes the Motion for Relief from Automatic Stay for several reasons. First, Debtor states that he has the "necessary insurance," and offers the "Renewal Declarations" of American Economy Insurance Company,

Exhibit 1, Dckt. No. 40, to provide proof of Debtor's newly obtained insurance with the Mulholland Insurance Agency and American Economy Insurance Company. Debtor does not provide any explanation of why the liability insurance was allegedly canceled in November of 2013. The Movant, Sabah Francis, testified that Debtor had canceled his liability insurance, in breach of the lease agreement with Movant, on November 20, 2013. It now appears that Debtor renewed his insurance with the American Economy Insurance Company from November 30, 2013 to November 30, 2014, renewing his coverage for an additional year-long term.

Second, Debtor states that he has a business listing agreement dated March 17, 2014, and ending on September 30, 2014, to to sell the "inventory, machinery, furniture, fixtures, and other equipment, leasehold improvements, fictitious business name statement, trade names and trademarks, logos, signs and advertising materials, telephone and fax numbers, vendor lists and catalogs, goodwill, agreements no to compete," if applicable. The Debtor provides no additional details about this agreement, forcing the court to canvas Debtor's supplemental pleadings and evidence to determine what "listing agreement" Debtor can possibly be referring to. Upon the court's review of Exhibit "B" filed in support of the Opposition, on Dckt. No. 40, the court notes that Debtor has submitted a Business Listing Agreement, ostensibly entered between Debtor and "Capitol Commercial R.E. & Business Sales." The Agreement appears to authorize Capitol Commercial R.E. and Business Sales the exclusive and irrevocable right to sell the business of Happy Laundry, located in Rancho Cordova, located at 10144 Colma Road., Rancho Cordova, California. Capitol Commercial R.E. & Business Sales is listed as a "Broker."

The agreement appears to be a listing contract between a real estate brokerage and Debtor, the seller of his sole proprietorship and the attendant real property, to give the broker the right to offer the property for sale for the period of March 17, 2014 to September 30, 2014. The list price at which the property will be offered for sale is \$64,000.00, \$10,000.00 of which will be distributed as compensation to the Broker after consummation of the sale. This agreement shows Debtor's intent to sell the property, but not that the sale has been effected to pay for the amount of Movant's claim. Debtor does not specify whether the proceeds of a potential sale will be used to satisfy Movant's claim. Movant has not yet filed a Proof of Claim, but states that it will do so soon; the claim will include the post-petition lease payment and related charges for the month of February, 2014, which Debtor has not paid, in the amount of \$3,769.94.

The third reason for Debtor's opposition to the Motion for Relief is that Debtor is now current on the \$3,796.94 payment as required by the court, and intends to be current on or before the 10th of each month until the sale pays Movant in full.

Fourth, Debtor states that he will file a Motion to sell after receiving offers on the property. Debtor states that he does not desire to prolong the sale of the business and is actively seeking offers. Upon receiving "any viable offer," Debtor pledges to file the appropriate motion to approve such a sale.

Fifth, Debtor states that his plan is to assume and cure the lease. Debtor states that his Chapter 13 Plan reflects his intention to pay the arrears of the lease through the chapter 13 plan, in a lump-sum sale of the business. Debtor states that he is actively seeking to make this sale and

end the plan with payoff to the creditor.

RESPONSE BY MOVANT

Movant acknowledges that the Debtor paid the March 2014 post-petition lease payment in the amount of \$3,769.94 has been paid. The next post-petition lease payment is due on April 1, 2014, in the amount of \$3,769.94. Having filed this reply to the Opposition on March 27, 2014, Movant did not state whether the April 2014 post-petition payment was made.

Movant points out that under the terms of the lease, the respondent is to provide liability insurance insuring the landlord and the tenant for injury or death in the amount of \$1,000,000.00 and insuring the landlord and tenant for property damages in the amount of \$500,000.00. Debtor has provided what he purports to be proof of insurance; Movant argues, however, that the form conditions the provision of insurance on the Debtor's payment of a premium. Movant states that it is unaware whether or not the premium has been paid, and that the information provided does not indicate the amounts of coverage and is not signed by an authorized representative of the insurance company.

SUPPLEMENT BY MOVANT

The \$3,796.94 lease payment for March 2014 and April 2014 was paid on time. The lease payment for May 2014 was not paid in full and Debtor is \$500.00 delinquent for the court ordered May 2014 lease payment. Further, the June 2014 lease payment was not paid, as of June 2, 2014.

MOTION TO SELL

On May 6, 2014, the court entered an order granting Debtor's requested to sell the Happy Laundry business for \$40,000.00. See Civil Minutes (Dkt. 69).

RULING

Movant's request for relief was predicated on Debtor's non-payment of the post-petition lease payments, and that it appeared that Debtor had breached the lease agreement for allowing the liability insurance on the rental property lapse. While Debtor, at one point, was current on the lease payments, as Movant points out, Debtor is now delinquent \$500.00 for May 2014 and the full lease payment amount due for June 2014.

The question of whether or not Debtor has obtained liability insurance for another year remains unclear. Debtor has provided a document which he claims to be proof of insurance for his business. Movant argues that the "Renewal Declaration" shows that the Debtor, doing business as Happy Laundry Company, is not insured for an extended term, from November 30, 2013 to November 30, 2014. Movant correctly points out that the Declaration conditions the provision of insurance in exchange for Debtor's payment of the premium, listed (\$2,181.00) in the Declaration. Debtor has not provided any proof showing that the premium has been paid, and that the Debtor has filled out all the necessary forms and made the required payments to obtain coverage for the period stated.

The "Declaration" supplied is not the equivalent of a proof of insurance document, which shows that an individual or entity has valid

insurance coverage with an insurance company. Rather, the Declaration provides basic information about the proposed policy, stating what will be insured, for how much, and for how long. The Declaration is not definitive proof that Debtor has in fact, obtained insurance for the property and that coverage with the Mulholland Insurance Agency has been finalized at this time. If Debtor has not obtained coverage on the property for another year, then Debtor is breach of his lease agreement. Debtor will not making all required post-petition payments as called for by the lease agreement. Therefore cause would exist for terminating the automatic stay, since the Debtor has not made all post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court is persuaded to grant Movant's Motion on the basis that Debtor is not making required post-petition payments and has not provided the court with conclusive proof of an insurance policy with the coverage limits as specified in the lease, evidencing that the premium was paid.

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). Here, Debtors have not made the court ordered lease payments on the property and is has not demonstrated evidence of insurance. 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).

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 Sabah Francis and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 10144 Coloma Road, Rancho Cordova, California.

No other or additional relief is granted.

RIVER CITY INVESTORS, LLC
VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2014. Fourteen days' notice is required. That requirement was met.

Tentative 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. If any of these potential respondents appear at the hearing and offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. 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:

River City Investors, LLC seeks relief from the automatic stay with respect to the real property commonly known as 900 Fruitvale Road, Lincoln, California. The moving party has provided the Declaration of John Slaughter to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Slaughter Declaration states Movant purchased the subject property at a foreclosure sale and received a duly executed deed from the Trustee which was recorded in the official records of Placer County on January 24, 2014. River City commenced an eviction action to obtain possession of the property in Placer County Superior Court (Case No. MCV0060496) Judgment was entered in favor of River city on May 9, 2014 for possession of the property. However, as a result of the filing of Debtors' bankruptcy, the execution on the writ of possession has been stayed. Debtor has not make any "rent" payments to Movant.

Discussion

The court maintains the right to grant relief from stay for cause when the debtor has no ownership interest in the subject proeyt and is in the possession of the subject property following purchahse of the property by

a party at a foreclosure sale. The property is not "property of the estate" and neither Debtor nor the Trustee have any interest in the property. See *In re Windmill Farms, Inc.*, 841 F.2d 1467 (9 Cir. 1988); *In re Smith*, 105 B.R. 50 Bankr. C.D. Cal. 1989). 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).

Debtors' lack of ownership interest demonstrate that Debtors retain no equity in the subject property.

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). Further, there is no evidence for the court to conclude that the collateral is necessary for Debtors' effective reorganization since Debtors did not own the property at the time of filing.

The court shall issue a minute order terminating and vacating the automatic stay to allow River City Investors, LLC., 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.

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 River City Investors, LLC, 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 900 Fruitvale Road, Lincoln, California.

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.

June 10, 2014 at 1:30 p.m.

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No other or additional relief is granted.