

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

June 14, 2016 at 1:30 p.m.

1. 15-26656-E-13 GARY STEPHAN
EAT-1 Dale A. Orthner

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR RELIEF FROM CO-DEBTOR STAY
5-10-16 [[91](#)]

DEUTSCHE BANK NATIONAL TRUST
COMPANY VS.

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).

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.

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

Correct 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 May 10, 2016. By the court's calculation, 35 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). 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 defaults of the non-responding parties are entered.

The Motion for Relief From the Automatic Stay is granted.

Deutsche Bank National Trust Company as Trustee for Indymac Index Mortgage Loan Trust 2007-FLX6, Mortgage Pass-Through Certificates Series 2007-FLX6 ("Movant") seeks relief from the automatic stay with respect to the real

June 14, 2016 at 1:30 p.m.

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property commonly known as 2500 Venturer Lane, Lake Havasu City, Arizona (the "Property"). Movant has provided the Declaration of Christian Lazu to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Christian Lazu Declaration states that there are eight post-petition defaults in the payments on the obligation secured by the Property, with a total of \$7,554.24 in post-petition payments past due.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on May 31, 2016. Dckt. 98. The Trustee states that the Debtor does not have a confirmed plan. The Movant was treated as a Class 3 Surrender in the plan. The Debtor does not have a pending plan before the court. The Trustee has a Motion to Dismiss set for hearing on June 22, 2016.

The Trustee states that the Debtor has paid a total of \$1,962.96 to the Trustee. The Trustee has made no disbursements.

DISCUSSION

Request for Relief from the Automatic Stay

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$280,196.00 (including \$240,240.00 secured by Movant's first deed of trust), as stated in the Christian Lazu Declaration and Schedule D filed by Gary Robert Stephan ("Debtor"). The value of the Property is determined to be \$205,000.00, as stated in Schedules A and D filed by Debtor.

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. *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, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

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.

Request for Relief from the Co-Debtor Stay

The Movant also requests that the court grant relief from the co-debtor stay. However, the Movant fails to provide the name of the co-debtor and fails to provide any argument as to why, pursuant to 11 U.S.C. § 1301, relief would be proper. Without the Movant even mentioning the identity of the co-debtor, the court is not going to issue a "blank" relief from stay for a co-debtor. This is improper.

Therefore, the request for relief from the co-debtor stay is denied without prejudice.

Request for Relief from Fed. R. Bankr. P. 4011(a)(3)

The Movant requests in the prayer that the court waive the 14-day stay.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue 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 Deutsche Bank National Trust Company as Trustee for Indymac Index Mortgage Loan Trust 2007-FLX6, Mortgage Pass-Through Certificates Series 2007-FLX6 ("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 immediately vacated to allow Deutsche Bank National Trust Company as Trustee for Indymac Index Mortgage Loan Trust 2007-FLX6, Mortgage Pass-Through Certificates Series 2007-FLX6, 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 2500 Venturer Lane, Lake Havasu City, Arizona.

IT IS FURTHER ORDERED that the request for relief from the co-debtor stay pursuant to 11 U.S.C. § 1301 is denied without prejudice.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause shown by Movant.

No other or additional relief is granted.

2. [16-20576](#)-E-13 DANA MAGWOOD AND TRISHA MOTION FOR RELIEF FROM
JHW-1 GUTIERREZ-MAGWOOD AUTOMATIC STAY
Gary Ray Fraley 5-3-16 [[40](#)]
AMERICREDIT FINANCIAL
SERVICES, INC. VS.

Final Ruling: No appearance at the June 14, 2016 hearing is required.

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 3, 2016. By the court's calculation, 42 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). 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). 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 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.

Dana Earle Magwood and Trisha Arlene Guitierrez-Magwood ("Debtors") commenced this bankruptcy case on February 1, 2016. Americredit Financial Services, Inc. DBA DM Financial ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2008 GMC Sierra 1500, VIN ending in 0600 (the "Vehicle"). The moving party has provided the Declaration of Angelo J. Aguilar to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Angelo J. Aguilar Declaration provides testimony that Debtor has not made 2 post-petition payments, with a total of \$434.79 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 \$15,980.00, as stated in Schedule A, while the value of the Vehicle is determined to be \$13,901.69, as stated in Schedules B and D filed by Debtor.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on May 17, 2016. Dckt. 52.

The Trustee notes that the Debtor's plan has not been confirmed and was denied confirmation on April 15, 2016. Debtor is delinquent \$3,358.14 under the last proposed plan. The Debtor has paid a total of \$3,360.00 to the Trustee with the last payment posting on May 6, 2016. Movant filed a secured claim on February 25, 2016 in the amount of \$14,261.06 for principal, interest, and late fees, and \$869.58 in pre-petition arrears regarding a Vehicle.

Debtor's old plan classifies Movant regarding Vehicle as a Class 1 creditor receiving monthly payments of \$216.84 for the ongoing monthly contract installment and \$17.48 for the pre-petition arrears. To date, \$433.68 has disbursed to Movant in Class 1 and there is a principal balance due of \$0.00. The Trustee has disbursed \$0.00 in pre-petition arrears payment as no plan has been confirmed.

RULING

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. *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 and the estate have 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 existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Vehicle for Movant's claim does not provide adequate protection such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).]

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee 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 Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

The court shall issue an order terminating and vacating the automatic stay to allow Americredit Financial Services, Inc. Dba GM Financial, 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.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule

4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by Americredit Financial Services, Inc. Dba GM ("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 2008 GMC Sierra 1500("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 (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.

No other or additional relief is granted.

3. [11-45395](#)-E-13 NADER SHAHCHERAGHI
APN-1 Peter G. Macaluso

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR RELIEF FROM
CO-DEBTOR STAY
4-21-16 [[84](#)]

LAKESIDE GREENS HOMEOWNERS
ASSOCIATION VS.

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).

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.

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

Correct 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, 2016. By the court's calculation, 33 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). 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 defaults of the non-responding parties are entered.

<p>The Motion for Relief From the Automatic Stay is denied without prejudice.</p>
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Lakeside Greens Homeowners Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3401 Bermuda Ave, Apt. 26, Davis, California (the "Property"). Movant has provided the Declaration of Peg Hart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Hart Declaration states that there are 54 post-petition defaults in

the payments on the obligation secured by the Property, with a total of \$23,649.08 in post-petition payments past due.

According to the Declaration of Peg heart, the manager of Lakeside Green Homeowners Association, the defaults date back to November 1, 2011. Declaration, Dckt. 86. She testifies that the Homeowners' Association suffered,

- A. The first post-petition default in November 2011, and Movant did nothing;
- B. Then the second post-petition default in December 2011, and Movant did nothing;
- C. Then the third post-petition default in January 2012, and Movant did nothing;
- D. Then the fourth post-petition default in February 2012, and Movant did nothing;
- E. Then the fifth post-petition default in March 2012, and Movant did nothing;

these monthly now, in April 2016, defaults continued, with;

- F. The twelfth post-petition default in October 2012, and Movant did nothing;
- G. Then the thirteenth post-petition default in November 2012, and Movant did nothing;

these monthly now, in December 2012, continued, with;

- H. The twenty-fourth post-petition default occurring in October 2013, and Movant did nothing;
- I. Then continuing monthly, with the thirty-sixth post-petition default occurring in October 2014, and Movant did nothing;
- J. Then continuing monthly, with the forty-eight post-petition default occurring in October 2015, and Movant did nothing; until
- K. The fifty-fourth continuing monthly default which occurred in April 2016, when Movant "sprung" to action.

The Hart Declaration fails, or is careful to not provide, any explanation as to why and how, if there is a bona fide obligation owing, the Homeowner's Association failed to act.

The court notes that after slumbering for fifty-four months, for which there are alleged to be association dues owing, Movant demands that the court waive the normal fourteen-day stay of enforcement, because now, years later, Movant claims that it is not adequately protected.

The Movant is seeking relief from the automatic stay as well as relief from the co-debtor stay pursuant to 11 U.S.C. § 1301.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 10, 2016. Dckt. 90. The Trustee states that the Debtor is \$1,700.00 delinquent under the plan. The Creditor is included in Class 2A to be paid a monthly dividend of \$264.47 with an interest rate of 4.75%. The Creditor has filed Proof of Claim No. 7 in the amount of \$14,135.31 for pre-petition HOA Assessments. The Trustee has disbursed \$12,784.46 principal and \$1,775.66 interest on the claim. The Debtor's confirmed plan does not contain any provisions regarding post-petition HOA assessments.

DEBTOR'S OPPOSITION

The Debtor filed an opposition to the Motion on May 17, 2016. Dckt. 93. The Debtor states that the plan provides for the pre-petition arrears. The Debtor incorrectly made the assumption that the ongoing, post-petition payments to Creditor were covered in the plan.

While Debtor is delinquent in payments to Creditor, Debtor argues that he should not be penalized with the loss of his property for the way the Plan was proposed and confirmed. The Debtor seeks a provision that will allow him to cure the post-petition delinquency.

The Debtor asserts that he will be current on or before the hearing.

MAY 24, 2016 HEARING

At the hearing, both Parties requested that the court continue the hearing so that they and their clients could further pursue a settlement to address the underlying issues. The court continued the hearing to 1:30 p.m. on June 14, 2016.

DISCUSSION

To date, no supplemental papers have been filed in connection with the instant Motion.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$241,984.08 (including \$23,649.08 secured by Movant's assessment lien), as stated in the Hart Declaration and Schedule D filed by Nadar Shahcheraghi ("Debtor"). The value of the Property is determined to be \$385,295.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Property for Movant's claim provides adequate protection such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

With respect to the present Motion, Movant has shown that it is adequately protected. First, it has a lien in property with more than enough value to pay any debt - so long as such debt is actually owing and enforceable. Second, Movant has shown that it is adequately protected by choosing not to act for almost five years.

Movant's conduct is inconsistent with that of a homeowner's association which is actually providing services for which dues are owing. It is inconsistent with a creditor who is actually owed a debt. Movant, while having the opportunity to explain to the court some reasonable basis for the financial somnolence, if there is actually a debt owing, has chosen not to do so.

Debtor's Opposition

Debtor's opposition is equally lacking. First, Debtor fails (or refuses) to provide any evidence to support the arguments advanced by his current attorney in opposing the Motion. All that is argued is that Debtor "assumed" that the future, post-petition dues would (somehow) be paid as part of a pre-petition claim. Debtor does not (or will not) so testify, but merely this is argued by his counsel.

Next, Debtor's counsel assures that court that Debtor will find almost \$24,000.00 between the May 17, 2016 filing of the Opposition and the May 24, 2016 hearing. Opposition, p. 2:7-8; Dckt. 93. If the Debtor has access to such a large sum of money, then the financial information provided to the court under penalty of perjury to support a less than 100% plan appear suspect.

As between Debtor and Movant, Debtor's argument is less non-credible than Movant's arguments and evidence.

The court denies the Motion without prejudice. With just months left in the current Chapter 13 Plan, it appears doubtful that Debtor can cure the arrearage, if one actually exists. If Debtor can produce the money to cure the almost \$24,000.00 arrearage in one fell swoop, then the Chapter 13 Trustee and creditors have some time to investigate further and determine whether the current plan is in good faith and consistent with the Bankruptcy Code.

Therefore, the Motion is denied without prejudice.

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 Lakeside Greens Homeowners Association ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, the Parties jointly requesting that the hearing be continued, and good cause appearing,

IT IS ORDERED that the hearing on the Motion for Relief From the Automatic Stay is denied without prejudice.