

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Modesto, California

June 16, 2016 at 10:00 a.m.

1.	<u>16-90103</u> -E-7 JOSE MERCADO MDE-1 Nelson F. Gomez WELLS FARGO BANK, N.A. VS.	MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY 4-26-16 [<u>28</u>]
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Tentative Ruling: The Motion to Confirm Termination or Absence of 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, and Office of the United States Trustee on April 26, 2016. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Confirm Termination or Absence of 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 to Confirm Termination or Absence of Stay is denied without prejudice.</p>

Wells Fargo bank, N.A. ("Movant") seeks to confirm that the automatic stay terminated respect to the real property commonly known as 775-777 South Orange Street, Turlock, California (the "Property").

June 16, 2016 at 10:00 a.m.

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Unfortunately, the Movant failed to properly serve the Chapter 7 Trustee. The Chapter 7 Trustee, at the time of filing, becomes the fiduciary of the estate and is a necessary party to be served on all motions. See Fed. R. Bankr. P. 9014; Local Bankr. R. 9014-1.

As such, the failure to properly serve the Chapter 7 Trustee, 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 to Confirm Termination or Absence of Stay filed by Wells Fargo Bank, N.A. ("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 Motion is denied without prejudice.

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING
IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED
RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES**

ALTERNATIVE RULING

Wells Fargo bank, N.A. ("Movant") seeks to confirm that the automatic stay terminated respect to the real property commonly known as 775-777 South Orange Street, Turlock, California (the "Property").

PRIOR BANKRUPTCY FILINGS BY DEBTOR

A review of the court's files discloses the prior bankruptcy cases filed by Debtor which have been pending and dismissed in the one-year period prior to February 10, 2016.

Chapter 13 Case No. 15-14152	Filed.....October 23, 2015 Dismissed.....January 13, 2016
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Thus, in the one-year period preceding the February 10, 2016 filing of this case, Debtor has had one case which was dismissed: Prior Chapter 13 Case No. 15-14152, dismissed January 13, 2016. The prior case being dismissed within the one-year period prior to the filing of this case brings into play the statutory provisions of 11 U.S.C. § 362(c)(3)(A) [emphasis added], which provides

(c) Except as provided in subsections (d), (e), (f), and (h) [not applicable to subparagraph (c)(3)] of this section-

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than

chapter 7 after dismissal under section 707(b)-

(A) the stay under subsection(a) with respect to any action taken with respect to a debt or property securing such a debt or with respect to any lease shall terminate **with respect to the debtor** on the 30th day after the filing of the later case;...

Thus, it appears that the automatic stay was terminated as of March 11, 2016.

Debtor is not left without possible relief, as 11 U.S.C. § 362(c)(3)(B) provides that court may impose a stay, if the Debtor, by **clear and convincing evidence**, can rebut the statutory presumption that the filing of the current case, in light of the prior pending and dismissed cases, is in bad faith. 11 U.S.C. § 362(c)(3)(C). Debtor has not requested that the court impose a stay.

No evidence has been presented to the court with the present Motion. Debtor does not even allege as to why the court should find that this case can Be filed in good faith.

DISCUSSION

Upon commencement of a bankruptcy case, the bankruptcy estate, into which all property of the debtor is transferred by operation of law is created. 11 U.S.C. § 541(a). Property of the bankruptcy estate is not property of the Debtor unless abandoned by the Trustee (either as approved by order of the court, upon dismissal of the case, or closing of the bankruptcy case). 11 U.S.C. §§ 554(a) or (b), 349 (b)(3), 554(c).

The Supreme Court has been very clear in reading and applying the “plain language” stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)); *United Savings Association of Texas v. Timbers of Inwood Forest Associates, LTD.*, 484 U.S. 365, 371 (1988).

In 11 U.S.C. § 101 Congress has defined “debtor” as a person, whether living or entity such as a corporation, partnership, or limited liability company, (11 U.S.C. § 101(13)); estate and property of the estate (11 U.S.C. § 541(a)); and exempt property (11 U.S.C. § 522). These terms for individuals, entities, estate, and property are all defining different things. The terms “debtor,” “estate,” “property of the estate,” and “property of the debtor” are not terms describing the same thing.

Congress created the automatic stay as specified in 11 U.S.C. § 632(a). The automatic stay applies and stays actions with respect to a number of persons, items, and acts, including:

- A. Commencement or continuation of action **against the debtor** [11 U.S.C. § 362(a)(1)];
- B. Enforcement of judgment obtained prior to the commencement of the case against,
 - 1. **Property of the Debtor** or
 - 2. **Property of the Estate** [11 U.S.C. § 362(a)(2)];
- C. Any act to obtain possession of **property of the estate, property from the estate**, or exercise control over **property of the estate** [11 U.S.C. § 362(a)(3)];

- D. Any act to create, perfect, or enforce any lien against **property of the estate** [11 U.S.C. § 632(a)(4)]; and
- E. Any act to create, perfect, or enforce a lien, which secures a claim which arose before the commencement of the case, against property of the debtor [11 U.S.C. § 362(a)(5)].

As shown in 11 U.S.C. § 362(a), Congress recognized that the debtor, property of the debtor, and property of the estate are different.

In 11 U.S.C. § 362(c) Congress provides that the automatic stay terminates, without order in the following circumstances:

- a. As to property of the estate, when such property is no longer property of the estate [11 U.S.C. § 362(c)(1)];
- b. The stay of any other act until the earlier of:
 - i. The case is closed;
 - ii. The case is dismissed; or
 - iii. The time the debtor is granted or denied a discharge [11 U.S.C. § 362(c)(2)(A), (B), and (C)].

To address a perceived abuse of the Bankruptcy Code by repeat filers, Congress provides in 11 U.S.C. § 362(c)(3) that the automatic stay shall be terminated on the 30th day after the filing of the later case if there was a case filed by the debtor which was dismissed within one year of the bankruptcy case then before the court. The language used by Congress in § 362(c)(3) is that “the stay under subsection [362](a) with respect to any action taken with respect to a debt to property securing such a debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case [then before the court].” Congress clearly provides that the entire stay provided for in 11 U.S.C. § 362(a) will not go into effect.

The court construes the instant Motion pursuant to 11 U.S.C. § 362(c)(3)(A) for and order confirming that the automatic stay terminated on the 30th day after the filing of the later case.

Based on the evidence submitted, the court determines that the automatic stay terminated as of March 11, 2016 in the instant case originally filed February 10, 2016, as to the Debtor, but not as to the Trustee and property of the bankruptcy estate.

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 to Confirm Termination or Absence of Stay filed by Wells Fargo Bank, N.A. (“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 court determines that the automatic stay terminated on the 30th day after the filing of this case, March 11, 2016, pursuant to 11 U.S.C. § 362(c)(3)(A), as to the Debtor. The automatic stay has not terminated as to the bankruptcy trustee or property of the bankruptcy estate.

No other or additional relief is granted.

2. 16-90435-E-7 JAMES/UEN FREEMAN
MET-1 Christian J. Younger

MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-26-16 [7]

WESTAMERICA BANK VS.

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.

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)(iii).

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, parties requesting special notice, and Office of the United States Trustee on May 26, 2016. 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). 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. At the hearing -----.

The Motion for Relief From the Automatic Stay is granted.
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James Alvin Freeman, Jr. and Uen Freeman ("Debtor") commenced this bankruptcy case on May 20, 2016. Westamerica Bank ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2011 Mercedes C300, VIN ending in 0379 (the "Vehicle"). The moving party has provided the Declaration of Donna Cory to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Donna Cory Declaration provides testimony that Debtor has not made one post-petition payment, with a total of \$487.10 in post-petition payments

past due. The Declaration also provides evidence that there are two pre-petition payments in default, with a pre-petition arrearage of \$994.20.

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 \$22,742.31, as stated in the Donna Cory Declaration, while the value of the Vehicle is determined to be \$16,766.00, as stated in Schedules B and D filed by Debtor.

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).

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 Westamerica Bank, 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 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 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 Westamerica Bank ("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 2011 Mercedes C300 ("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 waived for cause.

No other or additional relief is granted.

3. 16-90350-E-7 ALFREDO JESUS/MARIA MOTION FOR RELIEF FROM
JCW-1 DEJESUS HERNANDEZ AUTOMATIC STAY
 Charles A. Stoner 5-6-16 [[14](#)]
NATIONSTAR MORTGAGE, LLC VS.

Final Ruling: No appearance at the June 16, 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 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 6, 2016. By the court's calculation, 41 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.
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Nationstar Mortgage LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 673 Rockwood Avenue, Turlock, California (the "Property"). Movant has provided the Declaration of Chastity Wilson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Chastity Wilson Declaration states that there are no post-petition defaults in the payments on the obligation secured by the Property. The Declaration also provides evidence that there are 10 pre-petition payments in default, with a pre-petition arrearage of \$9,435.50.

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 \$247,191.02 (including \$247,191.02 secured by Movant's first deed of trust), as stated in the Chastity Wilson Declaration and Schedule D filed by name of Debtors Alfredo Jesus Hernandez and Maria DeJesus Hernandez ("Debtor"). The value of the Property is determined to be \$222,528.00, as stated in Schedules A and D filed by Debtor.

Movant's contention that the mere lack of equity is "cause," as set forth in 11 U.S.C. § 362(d)(1) is without merit. Lack of equity is one of the two necessary elements for relief from the automatic stay under 11 U.S.C. § 362(d)(2). The fact that the debtor has no equity in the estate is not sufficient, standing alone, to grant relief from the automatic stay under 11 U.S.C. § 362(d)(1). *In re Suter*, 10 B.R. 471, 472 (Bankr. E.D. Penn. 1981); *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984). Moving party has not adequately plead or provided an evidentiary basis for granting relief for "cause."

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 Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue 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.

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 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 Nationstar Mortgage LLC ("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 Nationstar Mortgage 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 673 Rockwood Avenue, Turlock,

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 not waived.

No other or additional relief is granted.

4. [15-90358](#)-E-11 LAWRENCE/JUDITH SOUZA
RDW-2 David M.Meegan

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR ADEQUATE PROTECTION
11-5-15 [[176](#)]

PROVIDENT CREDIT UNION VS.
CONTINUED: 5/12/16

Final Ruling: No appearance at the June 16, 2016 hearing is required.

The court having previously issued an Order Approving Stipulation and Denying Motion for Relief from Automatic Stay (Dckt. 342), the Motion for Relief from the Automatic Stay being denied, **the Motion for Relief from the Automatic Stay is removed from the calendar.**