

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein
Chief Bankruptcy Judge
Sacramento, California

June 25, 2019 at 1:30 p.m.

1.	<u>18-27282</u> -C-13 <u>TJS</u> -1	LEO CABRAL Gabriel E. Liberman	MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION 6-5-19 <u>[17]</u>
----	--	-----------------------------------	---

XCL TITLING TRUST VS.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 5, 2019. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

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

XCL Titling Trust LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Nissan Sentra, VIN ending in 3136 ("Vehicle"). The moving party has provided the Declaration of Jemei Clemons to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Leo Cabaral ("Debtor").

June 25, 2019 at 1:30 p.m.
Page 1 of 4

The Jemei Clemons Declaration provides testimony that Debtor has not made 11 post-petition payments, with a total of \$1,694.00 in post-petition payments past due.

Movant has also provided a copy of the Kelley Blue Book Valuation Report for the Vehicle. The Report has not been properly authenticated. Though the court will *sua sponte* take notice that the Kelley Blue Book Valuation Report can be within the “market reports and similar commercial publications” exception to the hearsay rule (Federal Rule of Evidence 803(17)), it does not resolve the authentication requirement. FED. R. EVID. 901. In this case, and because no opposition has been asserted by Debtor, the court will presume the Declaration of Jemei Clemons to be that she obtained the Kelley Blue Book Valuation Report and is providing that to the court under penalty of perjury. Movant and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

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 \$12,316.16, as stated in the Jemei Clemons Declaration, while the value of the Vehicle is determined to be \$11,737.00. Debtor identifies the Vehicle as being subject to a lease and does not Schedule any equity interest in the asset.

DISCUSSION

The court notes that Movant did not comply with this court’s Local Rules and filed the Motion as one docket item. The court requests than any future motions filed by Movant’s counsel comply with the filing requirement set forth in the Local Rules.

A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or David Cusick (“the Chapter 13 Trustee”), the court determines that there is no equity in the Vehicle for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Request for Attorneys’ Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys’ fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys’ fees or having any obligation to pay attorneys’ fees. Based on the pleadings, the court would either: (1) have to award attorneys’ fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys’ fees, and then make up a number for

the amount of such fees out of whole cloth. The court is not inclined to do either.

If grounds had been shown and evidence provided, the court could have easily made such determination and granted fees (assuming there is a contractual or statutory basis). If an amount of such fees had been included in the motion and prayer, the court and all parties in interest would fairly have been put on notice of the upper limit of such amounts, and the court could have taken the non-opposition and non-response as defaults.

While the court could consider the award of attorneys' fees as a post-judgment motion (Federal Rule of Civil Procedure 52(b) and Federal Rule of Bankruptcy Procedure 7052, 9014), the otherwise unnecessary cost and expense of Movant having to file a motion for an award of attorneys' fees for the unopposed Motion in which it made reference to wanting attorneys' fees would well exceed any attorneys' fees that the court would award for a motion such as this. Movant's strategic decision not to provide the court with grounds for and evidence of attorneys' fees has rendered it useless to proceed with a post-judgment motion that would cost more in unawarded (as in unnecessary and unreasonable fees) attorneys' fees.

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 XCL Titling Trust 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 the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2016 Nissan Sentra ("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 Movant having established that the value of the Vehicle subject to its lien not having a value greater than the obligation secured, the moving party is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

No other or additional relief is granted.

FIRST TENNESSEE BANK, N.A.
VS.

Final Ruling: No appearance at the June 25, 2019 hearing is required.

The Motion for Relief from Automatic Stay is dismissed without prejudice.

First Tennessee Bank, N.A. (“Movant”) having filed a “Withdrawal of Motion”, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on May 31, 2019, Dckt. 75; no prejudice to the responding party appearing by the dismissal of the Motion; Movant having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the responses filed by the Debtors and the Chapter 13 Trustee; the Ex Parte Motion is granted, the Movant’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 First Tennessee Bank, N.A. (“Movant”) having been presented to the court, the Movant having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 75, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Relief from the Automatic Stay is dismissed without prejudice.
