

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

July 26, 2016 at 1:30 p.m.

1. **16-23660-E-13 LEILA POURSAED MOTION FOR RELIEF FROM**
EMM-1 Pro Se AUTOMATIC STAY
6-22-16 [[15](#)]

THE BANK OF NEW YORK MELLON
VS.

Final Ruling: No appearance at the July 26, 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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on June 22, 2016. By the court's calculation, 34 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 and the court determines that no automatic stay went into effect at the time of filing the instant case pursuant to 11 U.S.C. § 362(c)(4)(A).

The Bank of New York Mellon fka The Bank of New York, as trustee for the certificateholders of CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2004-HYB7, Mortgage Pass-Through Certificates, Series 2004-HYB7, its assignees and/or successors in interest ("Movant") seeks confirmation that the automatic stay did not go into effect at the time of filing. Movant asserts that, under 11 U.S.C. § 362(c)(4)(A), the automatic stay never went into effect at the filing of the instant case because the Debtor

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had filed 2 or more cases within the pending year that were dismissed. FN.1. Thus, Movant seeks to confirm that no automatic stay went into effect.

FN.1. The Movant inaccurately cites 11 U.S.C. § 362(c)(3)(A)(ii) as the basis for the Motion. In fact, the Movant appears to have been attempting to cite 11 U.S.C. § 362(c)(4)(A)(ii). The grounds asserted in the Motion are consistent with seeking relief pursuant to § 362(c)(4).

No Opposition has been filed by Leila Poursaied (“Debtor”).

TRUSTEE’S RESPONSE

David Cusick, the Chapter 13 Trustee filed a Response to the motion for Order Confirming No Automatic Stay in Effect under 11 U.S.C. §362(c)(3)(A)(ii) on July 12, 2016. Dckt. 23. Mr. Cusick states that the debtor’s petition was filed June 3, 2016. The Meeting of the creditors is set for July 14, 2016. The Trustee has not received any payments as no payments have become due.

APPLICABLE LAW

11 U.S.C. § 362(c)(3) states:

“(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 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;...**”

11 U.S.C. § 362(c)(3)(A) [emphasis added]. The plain language of the statute provides for termination of the stay “as to the debtor,” and nothing more. The automatic stay applies not only to the debtor but property of the bankruptcy estate. See 11 U.S.C. § 362(a)(2), (3), (4), (5).

This is contrasted with the provisions of 11 U.S.C. § 362(c)(4)(A) enacted by Congress which provides that under the specified circumstances, “the stay under subsection (a) shall not go into effect....” Congress did not limit that provision to the stay as it applies to the Debtor.

Relief from stay proceedings are summary proceedings limited to the automatic stay issues. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at 8-9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief

DISCUSSION

The Debtor has filed 3 cases since November 30, 2015, (2) two of which have been dismissed within the past year:

1. Case No. 15-29263
 - a. Chapter 13
 - b. Filed November 30, 2015
 - c. Dismissed April 22, 2016 for failure to make plan payments
2. Case No. 16-22971
 - a. Chapter 13
 - b. Filed May 6, 2016
 - c. Dismissed May 24, 2016 for failure to timely file document
3. Case No. 16-23660
 - a. Chapter 13
 - b. Filed June 3, 2016
 - c. Pending

If a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed...the stay under subsection (a) shall not go into effect upon the filing of the later case. 11 U.S.C. § 362 (c)(4)(A)(I). On request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect. 11 U.S.C. 362(c)(4)(A)(ii).

Here, the Debtor had two prior cases pending and dismissed within the prior year. At no time did the Debtor attempt to have the automatic stay imposed after filing the instant case. As such, the automatic stay did not go into effect upon the filing of the instant case.

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 GP Equities, Inc. ("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) did not go into effect at the time of filing the instant case by operation of law pursuant to 11 U.S.C. § 362(c)(4)(A).

No other or additional relief is granted.

2. [13-29064](#)-E-13 **TERRY/REBECA BRISTER** **MOTION FOR RELIEF FROM**
ABG-1 **Mary Ellen Terranella** **AUTOMATIC STAY**
 6-21-16 [92]
KINECTA FEDERAL CREDIT UNION
VS.

Final Ruling: No appearance at the July 26, 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 June 21, 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). 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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Terry Harold Brister and Rebeca Brister ("Debtors") commenced this bankruptcy case on July 7, 2013. Kinecta Federal Credit Union ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2008 BMW Z4 Automobile, VIN ending in 4705 (the "Vehicle"). The moving party has provided the Declaration of Marshaun Logan-Larry to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Marshaun Logan-Larry Declaration provides testimony that Debtor has not made 16 months of post-petition payments, with a total of \$10,433.12 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 \$30,769.02, as stated in the Marshaun Logan-Larry Declaration,

while the value of the Vehicle is determined to be \$33,500.00, as stated in Schedules B and D filed by Debtor.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee filed a Response on July 8, 2016. Dckt. 101. The Trustee states that the Debtors are current under the confirmed plan. According the Trustee's records, creditor was confirmed as Class 2 secured purchase money secured interest and filed a proof of claim (Court claim 1) on 7-26-13 for the amount of \$33,528.88 on a 2008 BMW Z4. The Trustee has disbursed \$7,164.23 in principal and \$2,7736.21 in interest towards this claim. The Debtors then modified the Chapter 13 Plan (DN 77) which reclassified creditor to Class 3 surrender. The Debtors have paid a total of \$21,151.00 to date. Total disbursements to Kinecta Federal Credit Union are \$9,900.44.

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).

Although the Trustee responded by stating that the Debtors have in fact paid the Creditor \$9,900.44 through the confirmed plan, no disbursements were made to the creditor between October 2014 and October 2015 and between January 2016 and May 2016.

Furthermore, the Debtor reclassified the Class 2 secured claim of Kinecta Federal Credit Union to Class 3. Class 3 includes all secured claims satisfied by the surrender of collateral. Upon Confirmation of the plan, all bankruptcy stays are modified to allow a Class 3 secured claim holder to exercise its rights against its collateral. The Debtors' intention to surrender the collateral is sufficient evidence for this court to terminate the automatic stay.

The court shall issue an order terminating and vacating the automatic stay to allow Kinecta Federal Credit Union, 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 Kinecta Federal Credit Union (“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 BMW Z4 Automobile (“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.