

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein

Chief Bankruptcy Judge

Sacramento, California

July 29, 2014 at 1:30 p.m.

1. [12-40947](#)-C-13 KEVIN/STACIE FARRELL MOTION FOR RELIEF FROM
VVF-1 W. Steven Shumway AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
7-1-14 [[41](#)]

HONDA LEASE 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 July 1, 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, Honda Lease Trust, seeks relief from the automatic stay with respect to an asset identified as a 2012 Honda Civic, VIN # ending in 9974. The moving party has provided the Declaration of Katie Cargile to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Cargil declaration states that the underlying financial arrangement arises from a Vehicle Lease Agreement executed by Debtors. Debtors were required to maintain monthly lease payments of \$255.31 per month. On May 1, 2014, Debtors defaulted under the terms of the Lease Agreement and to-date, the number of payments that have come due and were not made by the Debtors total 1.6, plus a likely missed payment for July 2014. The balance on the

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lease agreement due and owing by Debtors to the Creditor is \$15,394.54.

Chapter 13 Trustee

The Chapter 13 Trustee filed a statement of non-opposition.

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).

As this is a Lease Agreement and Creditor maintains all ownership interest in the vehicle, Debtor has no equity interest in the subject collateral. Debtor has not maintained payments under the terms of the Lease Agreements and the court finds sufficient cause to grant the Motion for Relief from the Automatic Stay.

The moving party has plead adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other additional relief is granted.

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 Honda Lease Trust, 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 2012 Honda Civic, VIN # ending in 9974.

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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.

2. [14-20866](#)-C-13 GRIGOR MOVSESYAN CONTINUED OBJECTION TO
NLE-1 Peter G. Macaluso CONFIRMATION OF PLAN BY DAVID
Thru #3 P. CUSICK
3-26-14 [[42](#)]

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 and Debtor's Attorney on March 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, 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 sustain the Objection. 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:

Objection to Confirmation

The Chapter 13 Trustee opposed confirmation of the Plan for three reasons.

First, Section 2.06 of the Debtor's Plan indicates that attorney fees of \$6,000 have been charged in this case. The Disclosure of Attorney Compensation Form 2016 (Dckt. No. 12, page 33), indicates that \$5,000 has been charged. The Rights and Responsibilities, Dckt. No. 14, indicates total fees of \$4,000.00. The Trustee objects to the award of attorney fees on confirmation unless the fee amount is consistent.

Second, Debtor has claimed exemptions under California Code of Civil

Procedure §703.140, and Debtor appears to be married based on the Statement of Monthly Income, Dckt. No. 12. Debtor's spouse has not joined in the petition. California Code of Civil Procedure §703.140(2)(2) requires Debtors to file a spousal waiver, signed by Debtor and Debtor's spouse, for the use of claimed exemptions.

Third, whether the Debtor can actually make the lump sum payment called for by the plan is in question. The plan calls for the sale of the business within 90 days. The Debtor's business is located on leased premises where the landlord has filed for relief, Dckt. No. 22, and the Motion for Relief for the property is set for April 8, 2014, Dckt. No. 33.

Discussion

The court's decision is to sustain the objection in part and not confirm the plan.

The court overrules the objection as to the spousal waiver issue as Debtor filed the Spousal Waiver on April 3, 2014.

The court is still seeking clarification on the discrepancy raised by the Trustee concerning attorney compensation. Debtor has yet to address this issue formally in any supplemental testimony.

On May 6, 2014, the court entered an order granting Debtor's Motion to Sell "Happy Laundry," for the sum of \$40,000. The formal order was entered July 2, 2014. According to Debtor, this lump sum amount will permit him to pay all creditors in full. Further, Debtor's plan states that it will remit on-going lease payments (to Sabah Francis) until the sale is funded and the arrears will be paid with the proceeds. The court has not received confirmation that the sale transaction was completed, that Debtor is in receipt of the \$40,000, and or information on the status of the lease. At the last hearing on June 10, 2014, the court was informed that Debtor was current on the May and June 2014 adequate protection payments due to the lessor.

The court previous raised the issue of a pending Notice to Intent to Close Chapter 13 Case because Debtor has not filed the financial management course certificate. The court notes that Debtor filed the financial management court certificate on July 17, 2014.

While Debtor is slowly moving forward with prosecution of this case, the court lack sufficient evidence to confirm the proposed plan. Until the court is provided reassurance on the availability of the funds necessary to fund the plan, it cannot make a determination that the plan is feasible. The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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 Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good

cause appearing,

IT IS ORDERED that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

3. [14-20866](#)-C-13 GRIGOR MOVSESYAN CONTINUED MOTION FOR RELIEF
WAJ-1 Peter G. Macaluso FROM AUTOMATIC STAY
2-24-14 [[22](#)]
SABAH FRANCIS VS.

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:

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 had 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 requested 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 filed a statement supporting the Motion for Relief from the Automatic Stay and asserted 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."

OPPOSITION BY DEBTOR

Debtor opposed 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

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Movant acknowledged 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 was due on April 1, 2014, in the amount of \$3,769.94. At the last hearing on June 10, 2014, the court was informed that Debtor was current on adequate protection payments.

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.

MOTION TO SELL

On May 6, 2014, the court entered an order granting Debtor's request to sell the Happy Laundry business for \$40,000.00. See Civil Minutes (Dkt. 69). Formal order was entered July 2, 2014.

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).

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).

Adequate Protection Payments

Here, at the time the Motion was filed, Debtor was not current on the adequate protection payments and owed Lessor arrears dating back to March 2009. At the June 10, 2014 hearing, the court was informed that Debtor was current on the May and June 2014 adequate protection payments. See Civil Minutes, Dkt. 75. Debtor intends to use part of the proceeds from the sale of his business, "Happy Laundry," to cure the pre-petition delinquency due to Movant.

As it stands, the court has not received confirmation that Debtor is in receipt of the \$40,000 funds from the sale of "Happy Business" not that

it has remitted to Movant the arrearage owed under the terms of the Lease.

Liability Insurance

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 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 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 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.