

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher M. Klein
Bankruptcy Judge
Sacramento, California

September 10, 2019 at 1:30 p.m.

1.	<u>18-26962</u> -C-13 <u>RAS-1</u>	FRANCISCO SOLORIO Steele Lanphier	MOTION FOR RELIEF FROM AUTOMATIC STAY 8-7-19 <u>91</u>
	US BANK NATIONAL ASSOCIATION 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.

Local Rule 9014-1(f)(1) 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, creditors, parties requesting special notice, and Office of the United States Trustee on August 7, 2019. 28 days' notice is required. That requirement was met.

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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is XXXXX.

U.S. Bank National Association ("Movant") seeks relief from the automatic stay with respect to Francisco Solorio's ("Debtor") real property commonly known as 2968 Tourbrook Way, Sacramento, California ("Property"). Movant has provided the Declaration of Javier Gonzalez to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made seven post-petition payments, with a total of \$13,190.66 in post-petition payments past due. Declaration, Dckt. 95.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on August 22, 2019. Dckt. 98. The Trustee asserts that Debtor's confirmed Plan provides for plan payments of \$6,125.00 for months 1 through 5, \$3,058.00 for months 6 and 7, and then \$3,243.89 for the remaining 53 payments. The Trustee states that debtor has paid \$10,868.80 into the plan and that as of the date of the filing is delinquent \$4,670.00.

The Trustee notes that the Movant is provided for as Class 1 creditor for ongoing mortgage payments, pre-petition arrears, and post-petition arrears. The Trustee states that the mortgage payments are current under the confirmed Plan and the Trustee has disbursed a total of \$5,801.78 to date. A total of \$0.00 has been disbursed to date regarding pre-petition and post-petition arrears.

DEBTOR'S OPPOSITION:

On August 26, 2019, the Debtor filed an Opposition. Dckt. 101. The states that on July 30, 2019, the court confirmed Debtor's Amended Chapter 13 Plan. Dckt. 97. The confirmed plan provides for repayment of Movant's mortgage through the plan as a Class 1 debt. The Debtor claims that the plan payments he has made provide Movant's ongoing mortgage payments and post-petition arrears.

DISCUSSION

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 \$249,631.25 (Declaration, Dckt. 95), while the value of the Property is determined to be \$308,000.00, as stated in Schedules B 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. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movant's claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Here Debtor argues that Movant is provided adequate protection through the confirmed plan.

At the hearing ----

~~—————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.~~

~~—————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 U.S. Bank National Association (“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 vacated to allow Movant, 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 that is recorded against the real property commonly known as 2968 Tourbrook Way, Sacramento, California, (“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 to obtain possession of the Property.~~

~~No other or additional relief is granted.~~

THE GOLDEN 1 CREDIT UNION
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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2019. 28 days' notice is required. That requirement was met.

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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is granted.

The Golden 1 Credit Union ("Movant") seeks relief from the automatic stay with respect to Anna Rath's ("Debtor") real property commonly known as 6041 Buckboard Drive, Rio Linda, California ("Property"). Movant has provided the Declaration of Wes Motschman to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not provided for adequate protection payments, or property provided for Movant's pre-petition arrears through the proposed plan filed in this case, as well as proposed plan filed in Debtor's previous Chapter 13 proceeding. Case No. 19-20949, Dckt. 14.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on August 27, 2019. Dckt. 53. The Trustee asserts that Debtor has not made any payments since the filing of the petition on May 15, 2019. The Trustee's Objection to Plan Confirmation was sustained on July 30, 2019 (Dckt. 35) and no new plan is pending before the court. The Trustee also notes that the Trustee's Motion to Dismiss (Dckt. 25) was continued from August 21, 2019 to September 25, 2019.

DISCUSSION

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 \$152,619.25 (Declaration, Dckt. 40), \$134,137.00 attributable to a priority lien holder Lakeview Loan Servicing, while the value of the Property is determined to be \$269,000, as stated in Schedules B and D filed by Debtor. The court notes that Debtor appears to assert a 50% interest in the property on her schedules. Dckt. 12. The court also notes that Creditor asserts that the co-owner of the property is Debtor's spouse.

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, that Debtor is not current with plan payments and the proposed plan does not provide the Movant with adequate protection payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

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.

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.* Here the Movant asserts that Debtor has a history of filing cases to frustrate collection and Movant states in addition to the current case, Debtor's proposed Plans in the prior Chapter 13 cases did not provide for Movant's pre-petition arrears. (Case No. 19-20949, Dckt. 14).

- A. Case No. 11-27598
 - 1. Filed: March 28, 2011
 - 2. Chapter 7

3. Discharged: July 11, 2011
- B. Case No. 13-23580
1. Filed: March 18, 2013
 2. Chapter 13
 3. Date Dismissed: April 5, 2013
 4. Reason for Dismissal: Failure to file documents
- C. Case No. 13-26872
1. Filed: May 20, 2013
 2. Chapter 13
 3. Date Dismissed: June 7, 2013
 4. Reason for Dismissal: Failure to file documents
- D. Case No. 16-21574
1. Filed: March 15, 2016
 2. Chapter 13
 3. Date Dismissed: March 6, 2017
 4. Reason for Dismissal: Voluntary Dismissal
- D. Case No. 19-20949
1. Filed: February 19, 2019
 2. Chapter 13
 3. Date Dismissed: May 3, 2019
 4. Reason for Dismissal: Failure to provide required documents to Trustee

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 13 case in the Eastern District of California was part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. The filing of the current Chapter 13 case cannot have been for any bona fide, good faith reason in light of the repeated filings without a likelihood of success. In effect, this is a series of bankruptcy attempts by Debtor.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Movant has provided sufficient evidence concerning bankruptcy cases being filed to prevent actions against the Property. Movant has provided the court with evidence that Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases.

In granting the 11 U.S.C. § 362(d)(4) relief, the court notes that such is not the end of the game for Debtor. While granting relief through this case, if Debtor has a good faith, bona fide reason to commence another case while that order is in effect for the Property, the judge in the subsequent case can impose the stay in that case. 11 U.S.C. § 362(c)(4). That would ensure that Debtor, to the extent that some

bona fide reason existed, would effectively assert such rights rather than filing several bankruptcy cases that are then dismissed.

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 Golden 1 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 that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, 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 that is recorded against the real property commonly known as 6041 Buchboard Drive, Rio Linda, California, (“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 to obtain possession of the Property.

IT IS FURTHER ORDERED that the above relief is also granted pursuant to 11 U.S.C. § 362(d)(4), which further provides:

“If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.”

No other or additional relief is granted.

FINAL RULINGS

3. [19-23558-C-13](#) **KENNETH SCAMMON** **MOTION FOR RELIEF FROM**
[ETL-1](#) **Mark W. Briden** **AUTOMATIC STAY**
7-29-19 [\[18\]](#)
VW CREDIT, INC. VS.

Final Ruling: No appearance at the September 10, 2019 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2019. 28 days’ notice is required. That requirement was met.

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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). 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 and other parties in interest 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.

VW Credit, Inc. (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2014 Volkswagen Jetta Sedan, VIN ending in 2789 (“Vehicle”). The moving party has provided the Declaration of Jennifer Clothier to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Kenneth Scammon (“Debtor”).

Movant argues Debtor has not made one post-petition payment, with a total of \$311.46 in post-petition payments past due. Declaration, Dckt. 21. Movant does not claim that there exists any pre-petition arrearage. However, Movant flags for the court that Debtor lists assets in Class 3 as an asset to be surrendered in the confirmed Plan. Dckts. 2, Plan, 27, Order Confirming Plan.

The Clothier Declaration also seeks to introduce evidence establishing the Vehicle’s value. Though the NADA Valuation Report is attached as an Exhibit, it is not properly authenticated. Though the court will *sua sponte* take notice that the NADA 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 Clothier to be that she obtained the NADA 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.

DISCUSSION

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 \$14,408.96 (Declaration, Dckt. 21), while the value of the Vehicle is determined to be \$7,000.00, as stated in Schedules B and D filed by Debtor, which is slightly more than the retail value as stated on the NADA Valuation Report.

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (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 that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432. Additionally, the court notes that Debtor also provides for the vehicle to be surrendered as reflected in the Debtor’s confirmed Plan.

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.

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 VW Credit, 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 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 2014 Volkswagen Jetta Sedan (“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.

No other or additional relief is granted.