

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

October 6, 2022 at 10:00 a.m.

1.	<u>22-90225</u> -E-11 <u>SSA</u> -1	AVINASH SINGH David Johnston	MOTION FOR RELIEF FROM AUTOMATIC STAY 9-13-22 <u>[36]</u>
USHA SHARMA 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, Subchapter V Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 13, 2022. By the court's calculation, 23 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 xx 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, -----

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The Motion for Relief from the Automatic Stay is granted.
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Usha Sharma and Vikash K. Sharma (“Movant”) seeks relief from the automatic stay with respect to Avinash Singh’s (“Debtor / Debtor in Possession”) real property commonly known as 253 Tissot Drive, Patterson, California (“Property”). Movant has provided the Declaration of Usha Sharma to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues their note and second deed of trust matured on March 1, 2012. Debtor / Debtor in Possession has not made any post-petition payments and the current balance on the note is \$332,651.57. Declaration, Dckt. 41.

SUBCHAPTER CHAPTER V TRUSTEE’S STATEMENT

Walter R. Dahl (“the Subchapter V Trustee”) filed a statement of nonopposition on September 15, 2022. Dckt. 46. Subchapter V Trustee asserts that the Property is not necessary to an effective reorganization. *Id.* ¶ 3. Additionally, even if Creditor were to agree to a loan modification, Trustee is not confident Debtor nor their LLCs would have “sufficient income or free cash flow to service a new loan of \$200,000.00.” *Id.* ¶ 4.

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 \$332,651.57 (Declaration, Dckt. 41), while the value of the Property is determined to be \$580,000.00, as stated in Amended Schedules A/B and D filed by Debtor (Dckts. 19, 35). Additionally, Debtor claims an exemption of \$415,000.00 in the property, pursuant to California Code of Civil Procedure § 704.730, and “Mr. Cooper” has a First Deed of Trust on the Property for \$113,000.00. Schedules C and D, Dckt. 19. From the court’s review of the claims filed in this case, “Mr. Cooper” appears to be a service provider for Creditor Nationstar Mortgage LLC.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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.

11 U.S.C. § 362(d)(2)

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 reorganization. 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). Based upon the evidence submitted, the court determines that there is no equity in the Property for either 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 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.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed “reasonable fees and costs according to proof.” The Motion does not allege any contractual or statutory grounds for such fees (other than to state Movant seeks the fees “pursuant to the Security Agreement”). No dollar amount is requested for such fees.

However, in Movant's Memorandum of Points and Authorities, Movant provides the contractual grounds for their attorney's fees. Under ¶ 6(D) of the Note, Exhibit 1, Dckt. 38, Movant is entitled to recover reasonable attorney's fees and all court filing fees:

If the note holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney's fees and all court filing fees.

In Movant's Memorandum, Movant is seeking “\$6,570.00 in attorney's fees and actual costs incurred in this matter.” The court notes, however, from review of Movant's Counsel's billing records, Movant is requesting fees all the way back to September 3, 2019. The bankruptcy case was not filed until July 8, 2022, and this Motion was not filed until September 13, 2022. Therefore, it is unclear to the court why Movant is requesting fees all the way back to 2019 for this Motion.

It appears Movant believes they are entitled to an award of all fees incurred in enforcing the Note, not just fees related to this Motion. Effectively, Movant is seeking to use this Motion for Relief From the Stay as a proceeding to obtain a “judgment” for obligations owed on the underlying secured debt, not merely the prevailing party attorney fees in this one contested matter. (If awarded, this may well raise an issue of Movant seeking to prosecute a judicial proceeding to obtain a judgment on the underlying debt outside of enforcing its deed of trust.)

To support this, Movant cites 11 U.S.C. § 506 and *Kord Enters. II v. Cal. Commerce Bank (In re Kord Enters. II)*, 139 F.3d 684 (9th Cir. 1998). Pursuant to 11 U.S.C. § 506(b), fees, including attorney’s fees, costs, and charges, are allowed provided that:

(i) the claim is an allowed, secured claim; (ii) the creditor holding the claim is over-secured; (iii) the fees, costs and charges are provided for by the agreement, or state statute, under which the creditor’s claim arose; and (iv) the fees, costs and charges are reasonable.

4 Collier on Bankruptcy P 506.04 (16th 2022). Attorney’s fees, “may be added to the creditor’s secured claim under section 506(b) to the extent of any oversecurity and to the extent the fees are reasonable . . .” *Id.*

In *In re Kord*, a creditor brought an action pursuant to 11 U.S.C. § 506(b). A request for relief under 11 U.S.C. § 506(b) is a separate claim distinct from a request from relief from the automatic stay pursuant to 11 U.S.C. § 362(d). Though parties may join multiple claims in an adversary proceeding, with Federal Rule of Civil Procedure 18 being incorporated into Federal Rule of Bankruptcy Procedure 7018, Rule 18 has not been incorporated into bankruptcy contested matters (bankruptcy case motion, objection, application process). FED. R. BANKR. P. 9014(b). Therefore, the court reviews applicable law granting attorney’s fees in contested matters, like the motion for relief, not actions pursuant to § 506(b).

Additionally, the provisions of 11 U.S.C. § 506(b) merely provide that a creditor whose secured claim to be paid through the bankruptcy case may include attorney’s fees and costs (to the extent allowable by contract or statute). It does not provide a vehicle for Movant to obtain a judgment; an order constituting a judgment as provided in Federal Rule Civil Procedure 54(a), Federal Rules of Bankruptcy Procedure 7054, 9001(7), 9014(c); for a debt.

Attorney’s Fees Requested by Movant as Prevailing Party in This Contested Matter

In the Motion, which must state with particularity the grounds upon which the request are based and the relief itself, while stating the grounds for the relief from the stay, nothing is stated for the attorney’s fees sought to be awarded. In the prayer is the simple request “For payment of reasonable fees and costs according to proof.” With this request, Movant has set themselves up to request prevailing party fees by post order motion.

In the Points and Authorities, which is not the Motion, Movant states the basis for the fees and that Movant is seeking \$6,570.00. In the Declaration of Movant’s counsel, he authenticates billing and cost records for the legal services provided. Dckt. 42, ¶¶ 6, 7.

The billing records are provided as Exhibit 5 (Dckt. 39). The billings are for the period from September 3, 2019 through July 7, 2022. None of the billings relate to this Motion for Relief From the Stay.

The most recent, with a legal services date of June 23, 2022, and relate to communicating with a foreclosure service regarding the notice of sale by the foreclosure trustee. This Bankruptcy Case was filed on July 8, 2022, and none of the services on the Billing Records it is for a reply by counsel to Movant.

Though the court will consider requests for prevailing party attorney's fees as part of a motion for relief, given generally the very modest amount of legal fees relating to such motion and to avoid the cost of fees for a second motion, unfortunately Movant has not provided the court with evidence of attorney's fees being sought for this Contested Matter.

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 Usha Sharma and Vikash K. Sharma ("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 253 Tissot Drive, Patterson, 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 fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

Attorney's Fees and Costs, if any shall be requested as provided in Federal Rules of Bankruptcy Procedure 7054, 9014, and Federal Rule of Civil Procedure 54 as incorporated in the Federal Rules of Bankruptcy Procedure.

No other or additional relief is granted.

FINAL RULINGS

2. [22-90041-E-7](#)
[MBR-1](#)

AREA X INC.
David Johnston

JAYCO PREMIUM FINANCE OF
CALIFORNIA, INC.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
TO COMPEL ABANDONMENT
9-2-22 [80]

Final Ruling: No appearance at the October 6, 2022 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 7 Trustee, creditors, and Office of the United States Trustee on September 2, 2022. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay and Abandonment of Property 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 and Abandonment of Property is granted.

Jayco Premium Finance of California, Inc. dba JCAP Private Lending, a California Corporation, as servicer for Michael Clark ("Movant") seeks relief from the automatic stay with respect to Area X, Inc.'s ("Debtor") real property commonly known as 1609 Rouse Avenue, Modesto, California ("Property"). Additionally, Movant seeks the abandonment of the Property as the Property is not necessary for an effective organization and has no benefit to the estate. Pursuant to Local Bankruptcy Rule 9014-1(d)(5)(B)(iv), these requests may be joined in a single Motion. Movant has provided the Declaration of Robert Eakin to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

RELIEF FROM THE AUTOMATIC STAY

Movant argues the loan matured on September 1, 2022, and Debtor has failed to repay the Loan. Declaration, Dckt. 84.

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 \$206,010.41. Declaration, Dckt. 84. Movant would like the court to value the Property at \$195,000.00. Memorandum, Dckt. 85 p.9:8. Movant points to Debtor's Motion to Sell, Dckt. 33, where Debtor attempted to sell the Property for \$185,000.00, and then subsequently \$195,000.00. The court notes, however, a reason Debtor's Motion to Sell was denied was due to the unexplained reduction in value of the Property. Dckt. 52. Absent evidence indicating a lower value, the court values the Property at \$250,000.00, as stated in Schedules A/B and D filed by Debtor.

11 U.S.C. § 362(d)(1)

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.

11 U.S.C. § 362(d)(2)

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 reorganization. 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). Based upon the evidence submitted, the court determines that there is equity in the Property for the Debtor and Estate. 11 U.S.C. § 362(d)(2). However, this being a Chapter 7 case, the Property is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

ABANDONMENT OF PROPERTY

After notice and hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(a). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion requests that the court authorize Trustee to abandon the Property. The Property is encumbered by the liens of Jayco Premium Finance of California, Inc., JPL Income Fund, LLC, and Stanislaus County Tax Collector. On August 12, 2022, Trustee filed a Notice of No Distribution, indicating there are no funds available for distribution to creditors. Dckt. 78.

The court determines that the Property is of inconsequential value and benefit to the Estate and authorizes the Chapter 7 Trustee to abandon 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 Jayco Premium Finance of California, Inc. dba JCAP Private Lending, a California Corporation, as servicer for Michael Clark (“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 1609 Rouse Avenue, Modesto, 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 fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

IT IS FURTHER ORDERED that the Property is abandoned to Area X, Inc. by this order, with no further act of the Chapter 7 Trustee required.

No other or additional relief is granted.

October 6, 2022 at 10:00 a.m.

- Page 8 of 8 -