

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Modesto, California

October 20, 2016, at 10:00 a.m.

1. **16-90709-E-7** **JOSHUA/CARLY LILLIS** **MOTION FOR RELIEF FROM**
APN-1 **Patrick Greenwell** **AUTOMATIC STAY**
 9-22-16 [9]

FORD MOTOR CREDIT COMPANY
VS.

Final Ruling: No appearance at the October 20, 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 7 Trustee, and Office of the United States Trustee on September 22, 2016. By the court's calculation, 28 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) 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.

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

Joshua Lillis and Carly Lillis ("Debtor") commenced this bankruptcy case on August 3, 2016. Ford Motor Credit Company ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2014 Ford Fiesta, VIN ending in 4061 ("Vehicle"). The moving party has provided the Declaration of Claudia Haid to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

October 20, 2016, at 10:00 a.m.

The Claudia Haid Declaration provides testimony that Debtor has not made six (6) pre-petition payments, with a total of \$2,541.00 in pre-petition payments past due. The Declaration also provides evidence that there are two (2) post-petition payments in default, with a post-petition arrearage of \$847.00.

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 \$16,971.58, as stated in the Claudia Haid Declaration, while the value of the Vehicle is determined to be \$10,025.00, as stated in Schedules B and D filed by Debtor.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. Exhibit C, Dckt. 12. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. Fed. R. Evid. 803(17).

Though authenticated, the Movant has not provided the court with a basis for determining that this out-of-court statement is admissible hearsay. Fed. R. Evid. 802, 803. The court will not presume to make evidentiary legal assertions for Movant, which may or may not be so intended. Some common Hearsay Rule exceptions include records of regularly conducted activity, public records, and reports setting forth the activities of the public agency or observed pursuant to a duty imposed by law, and market reports, commercial publications. Fed. R. Evid. 803(6), (8), and 803(17).

The court will *sua sponte* take notice that the NADA Report can be within the “Market reports, commercial publications” exception to the Hearsay Rule, Fed. R. Evid. 803(17), but it does not resolve the authentication requirement, Fed. R. Evid. 901. In this case, and because no opposition has been asserted by the Debtor, the court will presume the Declaration of Claudia Haid to be that she obtained the NADA valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

DISCUSSION

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 because 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).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375–76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Ford Motor Credit Company, 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 fourteen-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 Ford Motor Credit Company ("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 Ford Fiesta ("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-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other or additional relief is granted.

2. [16-90083](#)-E-7 VALLEY DISTRIBUTORS,
KS-3 INC.

**MOTION TO APPROVE STIPULATION
FOR RELIEF FROM THE AUTOMATIC
STAY**
9-9-16 [\[227\]](#)

ROSE PETALS, LLC VS.

Final Ruling: No appearance at the October 20, 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, and the Chapter 7 Trustee on September 9, 2016. By the court's calculation, 41 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) 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.
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Rose Petals, LLC ("Movant") seeks relief from the automatic stay to proceed only against the available insurance assets of Valley Distributors, Inc. ("Debtor") in the claim related to construction industry standards and involving tort and contract claims. Recovery will be limited to available insurance coverage, if any. The moving party has provided the Declaration of Kimia Sagarchi to introduce evidence to authenticate the documents upon which it bases its claim.

STIPULATION

The Movant and the Trustee filed a stipulation that provides the following:

- A. Movant shall be granted limited relief from the stay to pursue and recover the proceeds of any insurance that may cover its claims and causes of action against Debtor as alleged in the state court action.

- B. The Trustee for Debtor makes no representation or warranty that Movant's claims are covered by insurance, or the scope, terms or conditions of any insurance policies.
- C. Movant expressly waives any deficiency or other claims against Debtor or Debtor's bankruptcy estate in or related to the state court action.
- D. Debtor shall not be responsible for any deductible or self-insured retention required under any insurance policy covering Movant's claims.

Dckt. 232.

APPLICABLE LAW

A party may seek relief from stay when the party needs to obtain a judgment against the debtor in name only in order to recover from the debtor's insurer. *IBM v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731 (7th Cir. 1991). When the court is reasonably confident that the policy proceeds will be sufficient to satisfy the creditor's claims paid under the policy, the court should grant relief from the stay to permit an action. Because the policy proceeds will be available only to the creditors with claims covered by the policy, there is no depletion of assets that would otherwise be available to general, unsecured claims, and there is no reason to delay the creditor seeking to recover under the policy. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

Given that Movant would not seek to enforce any judgments against the Debtor and will proceed against the Debtor only to the extent its claims can be satisfied from the Debtor's insurance proceeds, the court concludes that cause exists for the granting of relief from the automatic stay. The court shall issue a minute order terminating and vacating the automatic stay, pursuant to 11 U.S.C. § 362(d)(1), to allow the Movant to prosecute the claims against the Debtor, but not enforce any judgments against the Debtor or the estate other than against available insurance coverage, if any.

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 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 Rose Petals, LLC, its agents, representatives, and successors to prosecute the claims against the Debtor, but not enforce any judgments against the Debtor or the estate other than against available insurance coverage, if any, to final judgment (including all appeals) in the state court action captioned *Flowers, Kevin, et al. v. Rose Park LLC and Florsheim Homes, LLC* (consolidated with *Romay, Carolina, et al. v. Rose Park LLC, Rose Petals, LLC and Florsheim Homes, LLC*) in

the Superior Court of the State of California, County of San Joaquin, Case No. STK-CV-UCD-2014-2793.

IT IS FURTHER ORDERED that the Trustee is authorized to enter into the Stipulation for Relief from Automatic Stay filed as Docket No. 232.

No other or additional relief is granted.

3. [16-90793-E-7](#) SUSAN ALLEN
JPB-1

**MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-5-16 [10]**

**TROJAN CAPITAL INVESTMENTS,
LLC 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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 5, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required. FN.1

FN.1. Movant's Notice of Motion makes reference to both 9014-1(f)(1) and 9014-1(f)(2). Per the servicing date, the court will presume that Movant intended the motion to be pursuant to 9014(f)(2).

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). 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 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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Trojan Capital Investments, LLC (“Movant”) seeks relief from the automatic stay with respect to the real property commonly known as 4633 McKenna Drive, Turlock, California (“Property”). Movant has provided the Declaration of Don Madden, III to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Don Madden, III Declaration states that there are ten (10) post-petition defaults in the payments on the obligation secured by the Property, with a total of \$6,932.20 in post-petition payments past due. The Declaration also provides evidence that there are eighty-eight (88) pre-petition payments in default, with a pre-petition arrearage of \$59,287.36.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$421,443.62 (including \$188,782.00 secured by Green Tree Mortgage’s first deed of trust, \$187,588.62 secured by Movant’s second deed of trust, and \$45,073.00 from secured by IRS tax liens), as stated in the Don Madden, III Declaration and Schedule D filed by Susan Allen (“Debtor”). The value of the Property is determined to be \$408,867.00, as stated in Schedules A and D filed by Debtor.

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

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 Trojan Capital Investments, 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 that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Trojan Capital Investments, LLC, 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 4633 McKenna Drive, Turlock, California.

No other or additional relief is granted.