

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

October 24, 2017, at 1:30 p.m.

1. **16-27420-E-13** **JUDITH DARNOLD**
RDW-1 **Steele Lanphier**

**CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
9-8-17 [72]**

HERITAGE 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.

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—Final Hearing.

Sufficient 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 September 7, 2017. By the court's calculation, 26 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 13 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.

Heritage Credit Union ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2012 Chrysler 200LX, VIN ending in 8372 ("Vehicle"). The moving party has provided the Declaration of Destiny Davis to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Judith Darnold ("Debtor").

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The Destiny Davis Declaration provides testimony that Debtor allowed insurance coverage for the Vehicle to lapse and has not obtained new insurance. The Declaration also states that a Kelley Blue Book Valuation Report is attached to the Declaration of Movant's counsel. Though there is an exhibit attached to such Declaration, it is a letter and not a properly authenticated Kelly Blue Book Valuation Report. FN.1.

FN.1. Attaching exhibits to declarations, a motion, or other responsive pleading is not proper in this District. Local Bankruptcy Rule 9004-2(c) requires that the exhibits, which may be combined in one set of exhibits for the contested matter, be filed as a separate document from the other pleadings.

The Declaration of Movant's counsel provides testimony that Movant's counsel heard an unidentified representative of Movant say that the insurance on the Vehicle has lapsed. (Improperly) Attached as Exhibit 1 to counsel's declaration is an authenticated letter sent to counsel for Debtor asserting that the insurance has lapsed and requesting that evidence of such insurance be provided by August 3, 2017. Dckt. 75. Counsel testifies that he has not received a response from Debtor's counsel or evidence that there is vehicle insurance in place to protect Movant's interest in the Vehicle.

With respect to the value of the Vehicle, there is not sufficient evidence presented to the court. While Ms. Davis testifies that there is a Kelley Blue Book Value, no such Report has been filed with the court. Even if the court were to accept the lay opinion of Ms. Davis, it appears to show that the amount of the debt and value of the secured claim (11 U.S.C. § 506(a)) are about the same.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on September 19, 2017. Dckt. 80. The Chapter 13 Trustee responds that Debtor is now current under the Plan.

OCTOBER 3, 2017 HEARING

At the hearing, Debtor argued that insurance was in place, having been placed in August 2017. Dckt. 83. Movant argued that it was August 2017 when Movant sent a notice of cancellation and further asserted that neither Debtor nor Debtor's counsel have communicated about curing the lapse in insurance coverage or about replacement insurance being put in place by Debtor.

The Chapter 13 Trustee reported that a payment curing all but one default in monthly payments was made and that payment to Movant was in progress.

With Debtor having cured all but one default and having insurance in place, the court set the matter for a final hearing at 1:30 p.m. on October 24, 2017. Dckt. 85.

Written Opposition was ordered to be filed and served by October 11, 2017, and Replies, if any, by October 18, 2017. *Id.* No Opposition has been filed by Debtor.

DISCUSSION

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 Debtor defaulting by allowing insurance coverage to lapse. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Here, while the value appears to be about equal to the debt, Movant has provided evidence of there being a default caused by Debtor’s failure to maintain insurance on the Vehicle that secures Movant’s claim. The lack of insurance is cause to terminate the automatic stay.

Since the October 3, 2017, no party has filed additional pleadings indicating to the court that insurance is in place and that the default in monthly payments has been cured. No Opposition to the Motion has been filed by Debtor.

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.

Improper Request for Mandatory Injunction

On page 2 of the Motion, Movant requests that the court issue a mandatory injunction, ordering Debtor to “cooperate and turn over the Vehicle to Lender. . . .” Motion, p. 2:15–16. No points and authorities has been filed in support of the Motion. The Motion does not state any legal basis for the court issuing a mandatory injunction in this Contested Matter. The Motion does not state any legal basis for the court to issue a mandatory injunction based on two or three lines buried near the end of a motion. *See* FED. R. BANKR. P. 7001 (requiring that an adversary proceeding be commenced for injunctive relief).

The court denies the request for injunctive relief.

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. Buried at

the end of prayer for relief is the request “For an order waiving the 14-day stay described in Bankruptcy Rule 4001(a)(3).” Nowhere in the Motion does Movant state what grounds relate to this prayed-for relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

The Motion actually goes further, appearing to state that such relief is not being made at this time:

“In addition, and **if applicable**, Lender will seek an order waiving the requirements of Federal Rule of Bankruptcy Procedure 4001(a)(3), so that Lender may proceed with its rights under State law without the applicable waiting period specified therein.”

Motion, p. 2:1–3; Dckt. 72 (emphasis added). As of the filing of the Motion, Movant did not know if such relief was applicable and did not state what grounds were asserted in support of such relief.

While the court can conceive of possible grounds that could be asserted, none have been. It would be highly inappropriate to draft such a pleading and advocate for Movant and against Debtor. FN.2.

FN.2. The court notes that in the Declaration of Ms. Davis reference is made to Movant having expended monies to obtain forced place insurance to protect its interests. Thus, even though relief is not granted to make this order effective immediately, Movant has protected itself during any delay.

Movant has not 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 not granted.

The court denies such prayer for such relief.

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 Heritage 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 2012 Chrysler 200LX

("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 not waived for cause.

No other or additional relief is granted.