

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 23, 2021 at 1:30 p.m.

1.	<u>21-23510</u>-E-13	MUSTAPHA CHAM Anh Nguyen	MOTION FOR RELIEF FROM AUTOMATIC STAY 11-1-21 [24]
	OP ELEVEN HUNDRED OWNER, 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.

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 November 1, 2021. By the court’s calculation, 15 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, -----.

The Motion for Relief from the Automatic Stay is granted.
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OP Eleven Hundred Owner, LLC (“Movant”) seeks relief from the automatic stay with respect to Mustapha Adam Cham’s (“Debtor”) real property commonly known as 1100 Howe Avenue,

#279, Sacramento, California (“Property”). Movant has provided the Declaration of Nora Prasad to introduce evidence to authenticate the documents upon which it bases the claim and the obligation relating to the Property. Movant presents evidence that it is the owner of the Property. Based on the evidence presented, Debtor would be at best a tenant at sufferance.

Movant has provided a copy of the residential lease agreement which substantiates its claim as owner of the property. Exhibit 1 at 2, Dckt. 27. 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).

Movant has provided evidence that Debtor is in default for rental payments from the period of December 1, 2020 through February 28, 2021 in the amount of \$4,443.00. Declaration, Dckt. 26. Movant and Debtor entered a Stipulation for the Debtor to repay the rent and attorney fees. *Id.* Debtor failed to repay pursuant to the Stipulation. *Id.*

TRUSTEE’S REPLY

On November 8, 2021, Trustee David Cusick (“Trustee”) filed a response in which he would like the court to consider the following:

1. Debtor’s Meeting of Creditors will be held November 18, 2021.
2. Debtor’s first plan payment comes due November 25, 2021.
3. The Plan does not assume any executory contracts.
4. Debtor did not deposit any rent with the Bankruptcy Clerk nor assert any defense to eviction.
5. Creditor is not included in Debtor’s confirmed Plan.
6. Creditor is listed under Schedule F and Schedule G and has not filed a Proof of Claim to date.
7. Creditor did not use a Docket Control Number as required by Local Bankruptcy Rules 9014-1(c)(1).

Dckt. 31.

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)

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 rehabilitation. 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); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). 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, to exercise its rights to obtain possession and control of the Property, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

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 OP Eleven Hundred Owner, 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 vacated to allow Movant and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 1100 Howe Avenue, #279, Sacramento, California.

No other or additional relief is granted.

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, Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 2, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend 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, -----

The Motion to Impose the Automatic Stay is granted.

Angela Renee Beasley-Baker ("Debtor") filed her Motion to Extend the automatic stay as provided in 11 U.S.C. § 362(c)(3)(B) beyond the first thirty days in this case. However, this is Debtor's fourth bankruptcy petition pending in the past year with the prior three cases having been dismissed. Debtor's prior bankruptcy cases (Nos. 20-25435, 21-22487, and 21-22491) were dismissed on January 4, 2021, October 26, 2021, and August 23, 2021, respectively. *See* Order, Bankr. E.D. Cal. No. 20-25435, Dckt. 41, June 8, 2021; Order, Bankr. E.D. Cal. No. 21-22487, Dckt. 52, October 26, 2021; Bankr. E.D. Cal. No. 21-22491, Dckt. 18, August 23, 2021. The court notes No. 21-22491 was a duplicate filing of case No. 21-22487, and was dismissed pursuant to the erroneous filing. Bankr. E.D. Cal. No. 21-22491, Dckt. 18, August 23, 2021. However, that still leaves two prior cases pending and dismissed within one year prior to the filing of the current case. Because of the numerous previous filings in the past year, pursuant to 11 U.S.C. § 362(c)(4)(A)(I), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

Debtor states that the instant case was filed in good faith and explains that the previous cases were dismissed because her prior lawyer, Sarah Shapero, not only filed duplicate cases on the same day,

but also did not notify debtor of her duty to attend the creditor's meeting, nor provide the documents required—although she did file the required schedules. Motion, Dckt. 9.

Subsequent to the filing of the Motion to Extend, Debtor filed with the court a stipulation (hereinafter "Stipulation") between Debtor and Creditor AJX Mortgage Trust II ("Creditor"). Dckt. 14. In the Stipulation, the Debtor and Creditor state that the proper Bankruptcy Code Section at issue, 11 U.S.C. § 362(c)(4)(B). In the Stipulation, Creditor and Debtor recognize no automatic stay has been imposed due to previous bankruptcy filings in the past year. The Stipulation states that these Parties are seeking relief pursuant to 11 U.S.C. § 362(c)(4)(B) – imposition of the automatic stay. The court treats the Stipulation as an amendment to the Motion.

APPLICABLE LAW

When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4)(A), a party in interest may request within 30 days of filing that the stay take effect as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

For purposes of subparagraph (B), a case is presumptively filed not in good faith as to all creditors if:

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; . . .

11 U.S.C. § 362(c)(4)(D)(I).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine

good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

Debtor has asserted that the prior cases were not prosecuted and were then dismissed due to the conduct provided by her prior counsel. Debtor has new counsel in this case, who is now responsible for assisting Debtor in the diligent prosecution of this case.

DECISION

The Stipulation includes the following terms which the Parties seek to include in the order extending the stay. To the extent that this constitutes as compromise, no motion to approve compromise (Fed. R. Bankr. P. 9019) has been filed. These Stipulation terms include:

- 1. The automatic stay shall be imposed and remain in effect as to the Creditor, its successors and/or assigns, and the Property.
- 2. The Stipulation supersedes the terms and conditions of Debtor’s Plan, only where the terms conflict with the Stipulation.

In reading this position, it appears that the Parties eschew the requirements imposed by Congress for confirmation of a Chapter 13 Plan and seek by this Stipulation to have the court “confirm” these pre-confirmation plan terms, and such “confirmed” pre-confirmation terms shall bind all parties in interest, whether or not they comply with 11 U.S.C. § 1325.

- 3. Debtor agrees and shall dismiss with prejudice the State and District Court Cases that names Creditor, its servicer, or any of its affiliates, within ten days of entry of an order on this Stipulation.

It appears that Debtor will compromise rights of the Bankruptcy Estate (11 U.S.C. § 541(a)), presumably in good faith, by Debtor. This is requested as part of a Motion to Impose the Stay and the Debtor and Creditor do not seek to have the court approve the compromise after full and sufficient notice has been provided to all parties in interest.

- 4. Failure to dismiss pending litigation cases shall be a default.
- 5. Debtor agrees to amend the pending Chapter 13 Plan to include payment of pre-petition property tax arrears owed to the Solano County Assessor and Tax Collector, and Debtor shall file a proof of claim on behalf of the Assessor in order to ensure the Property Taxes are paid by the Chapter 13 Trustee.
- 6. Creditor will tender post-petition property taxes as long as this case is not dismissed or converted to another chapter.

7. Debtor shall continue maintaining insurance on the Property.
8. Debtor will ensure the Creditor is paid in accordance with their proof of claim by the Chapter 13 Trustee.

It is not clear what “Debtor will ensure” payment to Creditor, and what that means beyond Debtor stating that she will in good faith fulfill her duties and obligations under a confirmed plan.

9. The Stipulation is binding while there is an automatic stay against the Property during the bankruptcy case.
10. Creditor is entitled to immediate relief if the instant case is dismissed or converted to another Chapter.
11. If the Debtor defaults, Creditor shall request termination of the stay.
12. Creditor may accept any and all payments without prejudice to or waiver of any rights or remedies to which Creditor would otherwise have been entitled to under applicable non-bankruptcy law.
13. Parties agree the Stipulation does not change terms or conditions contained within the Note and/or Deed of Trust.
14. Parties agree Debtor is liable for attorneys’ fees and costs associated with the Stipulation, not to exceed 5.0 hours at \$275.00 per hour.

Given that there is no stay in this case and the grounds stated, the court treats this as an *ex parte* motion and enter interim relief imposing the 11 U.S.C. § 362(a) stay for all persons and purposes pending final hearing.

November 23, 2021 Hearing

At the hearing, **XXXXXXX**

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.

Upon review of the Motion, as amended by the Stipulation of Debtor and Creditor, the court treating the amended Motion as an *ex parte* motion seeking immediate imposition of the automatic stay as provided in 11 U.S.C. § 362(c)(4)(B) pending final hearing, and good cause appearing;

IT IS ORDERED that the Motion is granted and automatic stay imposed pursuant to 11 U.S.C. § 362(c)(4)(B) for all parties and until extended or terminated sooner by subsequent order of the court.

FINAL RULINGS

3. [19-24355-E-13](#) **GLENN LEWIS** **CONTINUED MOTION FOR RELIEF**
[CLB-1](#) **Chad Johnson** **FROM AUTOMATIC STAY AND/OR**
 MOTION FOR RELIEF FROM
 CO-DEBTOR STAY
 9-1-21 [72]
- U.S. BANK, N.A. VS.**

Final Ruling: No appearance at the November 23, 2021 hearing is required.

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, Co-Owner, Chapter 13 Trustee, and U.S. Trustee on September 1, 2021. 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 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 dismissed without prejudice.

U.S. Bank NA (“Movant”) seeks relief from the automatic stay with respect to Glenn B. Lewis (“Debtor”) real property commonly known as 8909 Garrity Drive, Elk Grove, California (“Property”). Movant has provided the Declaration of Samuel Pearce to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

On November 28, 2021, Movant filed a “withdrawal” of this Motion. Dckt. 87. Under the Federal Rules of Civil Procedure a party does not have the ability to “withdraw” pleading from the court. However, Federal Rule of Civil Procedure 41, which is incorporated into Federal Bankruptcy Procedure 7041 and into contested matters by Rule 9014(c), allows the dismissal of a complaint/motion/application unilaterally by the filer if no opposition has been filed. Fed. R. Civ. P. 41(a)(1)(A)(i), as incorporated into the Federal Rule of Bankruptcy Procedure. If a response has been filed, the filer may request the court dismiss the complaint/motion/application. Fed. R. Civ. P. 41(a)(2).

The court construing the “Withdrawal” as an ex parte motion to dismiss, such dismissal is consistent with the Debtor’s response. The Motion is dismissed without prejudice.

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 NA (“Movant”) having been presented to the court, Movant having made an ex parte motion to dismiss, such dismissal consistent with Debtor’s Response, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is Dismissed without prejudice.