

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein

Bankruptcy Judge

Sacramento, California

December 18, 2018 at 1:30 p.m.

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1.	<a href="#">17-24000</a> -C-13	LYNDA STOVALL	CONTINUED MOTION FOR RELIEF
	<a href="#">AP-2</a>	Peter Macaluso	FROM AUTOMATIC STAY
			10-24-18 [ <a href="#">126</a> ]
	HSBC BANK USA, N.A. VS.		

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**No 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.

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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 October 24, 2018. 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.

<p><b>The Motion for Relief from the Automatic Stay is <span style="color: red;">xxxxxx</span>.</b></p>
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HSBC Bank USA, National Association as Trustee for Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2006-AR2 ("Movant") seeks relief from the automatic stay with respect to Lynda Stovall's ("Debtor") real property commonly known as 7544 Wynndel Way, Elk Grove, California ("Property"). Movant has provided the Declaration of LaKeidra Barber to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The LaKeidra Barber Declaration states that there are 3 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$8,454.26 in post-petition payments past due. The Declaration also provides evidence that there are 6 pre-petition payments in default, with a

pre-petition arrearage of \$14,238.97.

#### **CHAPTER 13 TRUSTEE'S RESPONSE:**

The Chapter 13 Trustee responds that Debtor is delinquent \$15,279.27 under the confirmed plan. Debtor has paid \$42,724.95 into the plan. The Trustee's Motion to Dismiss has been continued to December 18, 2018 to allow for the resolution of Debtor's Motion to Confirm a Modified Plan. If the Modified Plan is confirmed it will cure the delinquency. The court notes that Trustee has filed an Opposition to the pending Motion to Confirm the Modified Plan stating that Debtor is delinquent under both the confirmed and the modified Plan and that the proposed Plan requires 62 months to complete.

#### **DEBTOR'S RESPONSE:**

Debtor's counsel responds that Debtor has filed a Motion to Confirm Modified Plan set for hearing on December 18, 2018. The proposed modified Plan provides for the post-petition outstanding payments on the mortgage sought in Movant's Motion. Debtor requests that the Motion for Relief be heard after the court has resolved Debtor's pending Motion to Confirm the Modified Plan.

#### **DISCUSSION**

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 \$315,612.14, as stated in the LaKeidra Barber Declaration and Schedule D. The value of the Property is determined to be \$313,000.00, as stated in Schedules A and D.

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 if the Modified Plan is approved. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

However, 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 will have come due if the Modified Plan is not confirmed. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

The court's determination of whether there is cause to grant relief from stay is predicated on whether the Debtor is able to confirm their proposed Modified Plan. At the December 18, 2018 hearing the court ~~xxxx~~ the Motion to Confirm Modified Plan. Accordingly, Movant's motion for relief is ~~xxxxx~~.

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 HSBC Bank USA, National Association as Trustee for Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2006 ("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 Motion for Relief from Automatic Stay is ~~xxxx~~.

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2. [18-27181](#)-C-13    MARCUS COTTON  
[FRB](#)-1                    Jeffrey Meisner

CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
11-16-18 [[11](#)]

5AIF SYCAMORE 2, LLC VS.

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**No 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.

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Local Rule 9014-1(f)(3) 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 November 19, 2018 as required by court Order. Dckt. 18. The court set the hearing for November 20, 2018. Dckt. 18.

The Motion For Relief From Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter13 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.

<b>The Motion for Relief from the Automatic Stay is <span style="color: red;">xxxx</span>.</b>
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5AIF Sycamore 2, LLC ("Movant") seeks relief from the automatic stay with respect to Marcus Cotton's ("Debtor") real property commonly known as 2730 Bell Street, Sacramento, California ("Property"). Movant has provided the Declaration of Patricia McLoon to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant states that the borrower on the subject obligation is an entity, Muscle Builder, Inc. ("the Borrower"), that is wholly owned by Debtor. The Patricia McLoon Declaration states that the loan entered into by the Borrower matured on March 12, 2018 and Movant recorded a notice of default with Sacramento County. Dckt. 16, Exhibit 9. On June 25, 2018, the Movant recorded a Notice of Trustee's Sale. Dckt. 16, Exhibit 10. On July 26, 2018, the Movant, the Borrower, the Debtor, and another individual who was an additional guarantor on the loan entered into two forbearance agreements. Dckt. 16, Exhibits 11 and 12.

Movant claims that Debtor has taken deliberate steps to frustrate Movant's ability to foreclose including:

1. Causing unauthorized pre-petition transfers including. A transfer from Borrow (entity wholly owned by Debtor) to Debtor and a transfer from Debtor to Debtor's mother. Dckt. 16, Exhibits 6 and 7, grant deeds.

2. Filing a state court complaint seeking injunctive relief to prevent foreclose. Dckt. 16, Exhibit 13. Movant claims this complaint was dismissed because it sought frivolous relief. and

3. Initiating bankruptcy proceedings with incomplete filings:

A. Case No. 18-26436: filed on October 11, 2018 without completed Schedules. On, October 31, 2018, obtained an extension to file Schedules. Case No. 18-26436; Dckt. 13. On November 9, 2018, the case was dismissed for failure to file required Schedules. Case No. 18-26436; Dckt. 26.

B. Present case, filed on November 15, 2018 with incomplete schedules.

Additionally, Movant alleges that while Debtor claims to be *Pro Se* in the current proceeding, the counsel that represented Debtor in the previously dismissed proceeding was in contact with Movant regarding this filing as late as November 15, 2018. Dckt. 19.

#### **DEBTOR'S OPPOSITION:**

Debtor did not file an opposition prior to the hearing.

At the November 20, 2018 hearing, the court continued the hearing to allow additional time for the Debtor to obtain counsel and file the required bankruptcy schedules.

#### **DISCUSSION**

##### **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).

### Prosecution of Chapter 13 Case

On November 29, 2018, a substitution of attorney was filed, with Jeffery Meisner, Esq., substituting in to represent the Debtor, who formerly was prosecuting this case in *pro se*. Dckt. 31. The Schedules and Statement of Financial Affairs have been filed. Dckt. 32.

On Schedule I Debtor lists receiving \$13,750 a month in gross wage income and an additional \$5,000 a month in disability payments. Dckt. 32 at 31-32. After withholding and deductions, Debtor states having monthly income of \$14,669. *Id.* at 32. On Schedule J, for a family unit of two (Debtor and daughter), Debtor lists having monthly expenses of (\$6,828), yielding a projected disposable income of \$7,841.

A proposed Chapter 13 Plan was also filed on November 29, 2018. Dckt. 33. That plan provides for monthly payments of the Debtor in the amount of \$7,841 for sixty months. For payment of creditors, the Plan provides:

- A. Class 1 Secured  
Claims.....None
- B. Class 2 Secured Claims
  - 1. Chase  
Auto.....  
.....\$ 18,133 (\$ 302.22 pmt)
  - 2. 5AIF Sycamore 2,  
LLC.....\$175,000  
(\$2,916.67 pmt)
- C. Class 3 Surrender  
Claims.....None
- D. Class 4 Secured  
Claims.....None
- E. Class 5 Priority Unsecured  
Claims.....\$175,000
- F. Class 6 Special Treatment Unsecured Claims...None
- G. Class 7 General Unsecured  
Claims.....\$ 46,426  
(100% Dividend)

In the Motion, Movant does not allege an amount of its secured claim in this case. Though not stated with particularity as required in the Motion (Fed. R. Bank. P. 9013), in the Declaration of Patricia

McLoon testimony is provided that the obligation \$206,991.16. Dec. ¶ 30-31, Dckt. 14.

Assuming a secured claim of \$207,000 that is being repaid over five years with five percent interest (amount proposed by Debtor), the monthly payment is \$3,906.35. This amount (or higher amount if the interest rate is slightly higher) can easily be funded through the projected disposable income.

If the priority unsecured claims total \$175,000 as stated in the Plan (no proofs of claim have been filed), those amortized over sixty months with no interest would be \$2,917. When added to the secured claim, \$6,624 a month is required to fund those claims.

After subtracting the Chapter 13 Trustee's fee (estimated high at 8%) of \$627 from the monthly plan payment of \$7,841, there is left \$7,213 to fund the plan - an adequate amount to cover the other secured claim (vehicle). The plan may result in creditors holding general unsecured claims not being paid in full. Or it may be that Debtor's expenses are given a closer review.

**December 4, 2018 Hearing:**

At the December 4, 2018 hearing Movant argued that while Debtor may be able to pay the arrears over the life of the Plan, Debtor does not own the property. Movant argues that the subject property was titled in the name of an entity owned by the Debtor at the time the debt was incurred and is currently titled in the name of Debtor's mother.

The December 4, 2018 hearing was continued to allow Debtor and Debtor's counsel to begin to address the issues concerning the ownership of the property at issue, the interests of the bankruptcy estate, and whether Debtor is capable of prosecuting this case and exercising the duties in lieu of a trustee.

**At the hearing -----.**

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 5AIF Sycamore 2, 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 Motion for Relief from Automatic Stay is **xxxx**.

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**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) .**

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Local Rule 9014-1(f) (3) 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 December 12, 2018. The court set the hearing for December 18 2018. Dckt. 46.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (3). 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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<b>The Motion to Extend the Automatic Stay is granted.</b>
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Marcus Cotton("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 18-26436) was dismissed on November 9, 2018, after Debtor did not file required documents. See Order, Bankr. E.D. Cal. No. 18-26436, Dckt. 26. Therefore, pursuant to 11 U.S.C. § 362(c) (3) (A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because he



received poor legal advice from he prior attorney. Debtor states that his prior counsel did not properly advise him about filing the required documents but his current counsel has done so. Dckt. 53, Debtor's Declaration. Debtor further states that he has filed a proposed Plan that will full pay his creditors and has filed his bankruptcy Schedules.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

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 sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The Motion is granted, and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this 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 to Extend the Automatic Stay filed by Marcus Cotton("Debtor") 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 Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

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