**United States Bankruptcy Court**
**Northern District of Illinois**
**Eastern Division**

**Transmittal Sheet for Opinions for Posting**

**Will this opinion be published?** No

**Bankruptcy Caption:** In re: Curtis C. Conway

**Bankruptcy Number:** 22 B 12839

**Adversary Caption:** N/A

**Adversary Number:** N/A

**Date of Issuance:** January 9, 2023

**Judge:** David D. Cleary

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**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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|---|---|---|
| In re: | ) | Case No. 22 B 12839 |
| | ) | |
| CURTIS C. CONWAY, | ) | Chapter 13 |
| | ) | |
| Debtor. | ) | Judge David D. Cleary |

**ORDER GRANTING MOTION OF AMERICAN CREDIT ACCEPTANCE FOR RELIEF FROM STAY**

This matter comes before the court on the motion of American Credit Acceptance ("ACA") for relief from the automatic stay ("RFS Motion"). Debtor Curtis Conway ("Debtor") opposed the RFS Motion, and the court entered a briefing schedule. Debtor filed a response ("Response") and ACA filed a reply ("Reply"). Having reviewed the papers and heard the arguments of the parties, the court will grant the RFS Motion.

**BACKGROUND**

Debtor purchased a 2014 Mitsubishi Outlander ("Outlander") on March 20, 2021. ACA financed the purchase. Debtor was required to tender equal monthly payments of $419.31 to ACA, beginning on May 4, 2021.

According to the RFS Motion, Debtor paid ACA $419.31 in two payments in May 2021. He next paid $200 on August 26, 2021. Debtor made no further direct payments to ACA.

On September 30, 2021, Debtor filed case number 21 B 11217 ("First Case"), seeking relief under chapter 13 of the Bankruptcy Code. ACA filed a secured claim in the amount of $15,940.19, alleging a prepetition default in the amount of $1,507.24.

Debtor filed a proposed plan in the First Case that provided for payment of ACA's secured claim. Debtor failed to appear at the § 341 meeting of creditors and the court dismissed

his case on January 10, 2022, pursuant to the motion of the chapter 13 Trustee. ACA repossessed the Outlander about two months after the court dismissed the First Case.

Debtor filed case number 22 B 2837 ("Second Case") on March 12, 2022. ACA returned the Outlander to Debtor and filed a proof of claim in the amount of $16,066.19, alleging a prepetition default of $3,729.79. Debtor brought a motion to extend the automatic stay, which the court granted on March 28, 2022.

In the Second Case, Debtor filed a proposed plan and an amended plan. According to allegations in the Response, unsupported by an affidavit or other evidence, Debtor could not secure permanent employment during the Second Case.[1] He lost his temporary employment in the summer of 2022 and incurred funeral expenses when his mother passed away. He defaulted on his vehicle insurance premiums and his policy lapsed.

On September 12, 2022, the court dismissed the Second Case for Debtor's failure to make plan payments. ACA repossessed the Outlander shortly after the court dismissed the Second Case.

Debtor filed this case ("Third Case") on November 3, 2022. Since Debtor had two bankruptcy cases pending within the past year that were dismissed, no automatic stay went into effect upon the filing of the Third Case. Instead, Debtor filed a motion to impose stay ("Motion to Impose"), seeking to obtain an order from this court imposing the stay upon all creditors. ACA objected to the Motion to Impose. The court entered an order temporarily imposing the stay on November 21, 2022, and continuing the Motion to Impose for further order. In the

[1] In fact, the affidavit in support of Debtor's motion to impose stay characterizes his employment situation during the Second Case a little differently: "In my second case I was hired as a temporary worker in the beginning and then became a full time employee. The payroll control order stopped deducting and I was under the impression that they would still deduct the plan payments from my checks. I didn't notify my attorneys about the change of employer." Motion to Impose, Ex. A.

meantime, ACA brought the RFS Motion. It also filed a proof of claim in the amount of $15,716.19, alleging a prepetition default of $6,734.27.

Debtor's amended plan, filed in the Third Case on November 11, 2022, proposes to pay ACA a preconfirmation payment of $150 per month and a postconfirmation payment of $328.16 per month. ACA is listed in section 3.3 of the amended plan with a $15,716.19 claim, paid at an interest rate of 9.25%.

According to Exhibit A of his Response, Debtor reinstated his vehicle insurance policy on November 23, 2022. His Schedule I reflects that he is employed at Nasco and, according to Exhibit B to the Response, he is paying rent of $850 per month at his new suburban residence. On page 2 of the Response, filed on December 9, 2022, Debtor wrote that his "Counsel will soon file new Schedule I and J to indicate the changes in Debtor's life."

No amended Schedule I or J are on the court docket as of the date of this order.

**DISCUSSION**

Motions for relief from stay are governed by 11 U.S.C. § 362(d), which states in relevant part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> > (1) for *cause, including the lack of adequate protection* of an interest in property of such party in interest[.][2]

11 U.S.C. § 362(d) (emphasis added).

[2] Parties may also seek relief from the stay under other subsections of § 362(d), but ACA has moved for relief only under § 362(d)(1).

What constitutes adequate protection is governed by 11 U.S.C. § 361, which states:

> [A]dequate protection may be provided by--
>
> > (1) *requiring* the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property[.]

11 U.S.C. § 361 (emphasis added).

ACA alleges that cause exists to grant relief from the stay because it is not adequately protected. Debtor addressed the question of adequate protection in his Response. He argued that this court should be "forward looking in making sure a secured creditor's collateral is being protected post-petition from potential damage and depreciation." Response, p. 3. Since he is providing full coverage insurance and has proposed payments in an amount sufficient to satisfy either of two commonly used tests,[3] Debtor contends that ACA is adequately protected. *See* 11 U.S.C. § 1326(a)(1)(C); *In re Corder*, No. 21 B 10189, 2021 WL 6124234, at *3 (Bankr. N.D. Ill. Sept. 15, 2021) ("[D]ebtor must provide to the creditor adequate protection for the potential harm that the creditor could reasonably sustain as a result of debtor's possession and use.") (quotation omitted).

Whether a creditor's interest in property is adequately protected "is not an exact science nor does it involve a precise arithmetic computation. Rather, it is pragmatic and synthetic, requiring a court to balance all relevant factors in a particular case[.]" *In re Morton*, No. 3:15-

[3] *See In re Robson*, 369 B.R. 377, 383 (Bankr. N.D. Ill. 2007) ("a debtor must provide a creditor with adequate protection payments … in the amount the collateral depreciates within the first month after the filing of the bankruptcy petition"); *In re Beaver*, 337 B.R. 281, 285 (Bankr. E.D.N.C. 2006) (adequate protection acceptable to the court when preconfirmation payments are made in the amount of 1% of the value of the secured creditor's collateral).

BK-30892-SHB, 2015 WL 4396719, at *2 (Bankr. E.D. Tenn. July 17, 2015) (quotation omitted).

Although Debtor's plan proposes monthly *preconfirmation* payments of $150 and *postconfirmation* payments of $328.16, ACA asserts that these payments are not feasible. Thus, Debtor has not satisfied his burden under § 362(g) of demonstrating that the promised payments provide ACA with adequate protection.

The court agrees with ACA's position. The question of whether ACA is adequately protected is not resolved solely by the amount of the proposed payments. The court may consider other factors, including the likelihood that Debtor will actually make those payments and "the debtor's prospects for a successful reorganization," *id.* (quotation omitted). *See also In re CST Grp., Inc.*, No. 13-11894 HRT, 2013 WL 2250210, at *3 (Bankr. D. Colo. May 22, 2013) ("Debtor has given the Court no evidence whatever that it has the ability to perform its promise of providing adequate protection to GEI. The Court finds that the Debtor's offer of adequate protection payments is wholly illusory and that the Debtor has not carried its burden to prove that GEI is adequately protected by its offer of periodic payments.").

While Debtor proposes plan payments to be distributed by the Trustee in the amount of $450 for 36 months, the Schedule J on file shows only $400 in available income. Moreover, Debtor's schedules do not include a rental or home ownership expense, even though he filed an exhibit with his Response that purports to show that he has a rent obligation of $850. If that exhibit is accurate, then Debtor's monthly net income is negative. Debtor has presented no evidence to support a finding that he will be able to make *plan* payments to the Trustee in full, and in fact the documents that are before the court tend to show that Debtor would be unable to make required payments.

Debtor's multiple unsuccessful bankruptcy cases, ACA asserts, further demonstrate a lack of adequate protection. ACA contends that "Debtor has established a pattern of multiple bankruptcy filings while enjoying the possession and use of the Vehicle without fulfilling his obligations under the Bankruptcy Code…. [His] conduct shows multiple filings with an attempt to deprive ACA of meaningful adequate protection for its secured interest in the Vehicle[.]" RFS Motion, ¶ 14-15.

Debtor argues that "prepetition conduct alone does not ordinarily justify granting relief from stay." *In re Bovino*, 496 B.R. 492, 505 (Bankr. N.D. Ill. 2013). In support of his argument, Debtor quotes this court's decision in *Corder*: "if prepetition payment defaults or temporarily lapsed insurance always constituted cause to modify the stay, the protection of the stay would be virtually meaningless." 2021 WL 6124234, at *4.

But Debtor's quotation from *Corder* left out some important language which immediately preceded his selection:

> The court is not taking the position that prepetition conduct can never constitute cause to modify the stay; there may be circumstances that are more compelling.

*Id.*

In other words, the court may examine the prepetition facts and circumstances of a case to see whether they rise above the ordinary and constitute cause, including the lack of adequate protection, to grant relief from the stay. In this case, the facts and circumstances are sufficiently different from those in *Corder* that it is not persuasive precedent:

- Ms. Corder was in the midst of her first bankruptcy case when the court issued its decision. This Debtor has filed his third bankruptcy case within a year. Both of his prior cases were dismissed before confirmation. The court dismissed the First Case after three months, because of the unreasonable delay caused by his failure to attend

any of the scheduled § 341 meetings. During the First Case, ACA received only $249 in Trustee disbursements. The court dismissed the Second Case six months after the petition date, at the eighth hearing on confirmation, because of the unreasonable delay caused by his failure to make plan payments. During the Second Case, ACA received only $365 in Trustee disbursements.

- Ms. Corder had missed three of five payments that came due prepetition. According to ACA's proof of claim, this Debtor's prepetition default is equal to approximately sixteen months of payments.
- Ms. Corder's car was repossessed once; this Debtor's car has already been repossessed twice.

The circumstances of this Debtor's prepetition conduct are compelling, and rise above the ordinary. The court need not decide that this prepetition conduct is sufficient to find that cause independently exists based on allegations of bad faith or other conduct. Instead, these particular circumstances further support a finding that ACA is not adequately protected and cause exists to modify the automatic stay under § 362(d)(1).

The Debtor has not provided evidence that he can and will make required payments and adequately protect the secured interests of ACA. Therefore, Debtor has not satisfied his burden under § 362(g) and the court cannot conclude that ACA is adequately protected.

The court will address one final issue. Debtor states in his Response that "AutoBank [sic] does not articulate any arguments for cause in the body of its motion but does allege without any analysis or legal support in its required statement accompanying its motion for relief that cause exists for lack of insurance and no provable income." Response, p. 6. Although Debtor did not use the word "waiver," this appears to be the gist of his statement. *See Tuduj v.*

*Newbold*, 958 F.3d 576, 579 (7th Cir. 2020) ("arguments not raised in an opening brief are waived"); *Gross v. Town of Cicero, Ill.*, 619 F.3d 697, 704 (7th Cir. 2010) ("It is not this court's responsibility to research and construct the parties' arguments, and conclusory analysis will be construed as waiver.") (quotation omitted).

In fact, ACA did not waive the argument that cause exists, based on this other conduct of the Debtor, under § 362(d)(1) to modify the automatic stay. In paragraph 16 of the RFS Motion, ACA asserted that Debtor did not include necessary expenses in his schedules, "which most certainly will affect his ability to maintain monthly payments." ACA then devoted the next five paragraphs to a review of Debtor's living arrangements and rental obligations in his bankruptcy cases. At the time, ACA did not have the benefit of knowing that Debtor signed a lease on November 1, 2022, just before filing the Third Case; it incorporated that additional fact into this argument in its Reply.

ACA also argued in the RFS Motion that Debtor's prepetition conduct and the filing of multiple bankruptcy cases constitute cause for relief from the stay. "Debtor has established a pattern of multiple bankruptcy filings while enjoying the possession and use of the Vehicle without fulfilling his obligations under the Bankruptcy Code…. [T]he Vehicle … has twice been repossessed for nonpayment and Debtor has failed to make any meaningful payments since purchasing the Vehicle." RFS Motion, ¶ 14, 26. In fact, the RFS Motion provides more detail and argument than most of the motions seeking relief from stay in chapter 13 cases that are presented to this court. *See, e.g., Matter of Vitreous Steel Prod. Co.*, 911 F.2d 1223, 1232 (7th Cir. 1990) ("Hearings to determine whether the stay should be lifted are meant to be summary in character. The statute requires that the bankruptcy court's action be quick.").

ACA asserts that such conduct independently establishes cause to modify the stay. *See* RFS Motion, ¶¶ 25-27. But, ACA also argues that the same conduct is evidence that the Debtor is not providing ACA with adequate protection and, therefore, cause exists to modify the stay. *See* RFS Motion, ¶¶ 14-15.

Having found that ACA is not adequately protected, that cause exists to lift the automatic stay under 11 U.S.C. § 362(d)(1) and that ACA has not waived its arguments, **IT IS HEREBY ORDERED THAT** the RFS Motion is **GRANTED**.

ENTERED:

Date: January 9, 2023

DAVID D. CLEARY
United States Bankruptcy Judge