

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
LILLIE M. SMITH,) CASE NO. BK97-80710
)
DEBTOR) CH. 13

MEMORANDUM

Hearing was held on December 1, 1997, on a motion for relief filed by Bank of Nebraska. Appearances: Albert Burnes for the debtor; Tracy Johnson for Nolan Nero; and Martin Pelster for the Bank of Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

Background

The debtor, Lillie M. Smith (hereafter "Smith"), was previously married to Nolan Nero (hereafter "Nero"). Prior to her bankruptcy and during her marriage, Nero purchased a 1989 Toyota Camry. The "Installment Sale Contract" lists only Nolan as the "Buyer" and the "Buyer (Co-Applicant)" space on the contract is blank. The Certificate of Title issued on April 13, 1994, indicates the owner of the motor vehicle is Nero. Smith's name does not appear anywhere on either the contract or the car's title.

Smith and Nero were divorced in Douglas County District Court on July 17, 1996. The Decree of Dissolution provides in pertinent part, "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner [Smith] shall be awarded the parties' 1989 Toyota Camry, VIN #_____, subject to any encumbrance thereon;" The decree operated as a conveyance of the automobile from Nero to Smith.

Smith filed a Chapter 13 petition on March 25, 1997 and her Chapter 13 plan has been confirmed. The Bank of Nebraska, (Bank), holder of the security interest in the Camry and the obligation, seeks a determination that the codebtor stay is inapplicable or, in the alternative, relief from the codebtor stay.

Discussion

I Codebtor Stay

Upon the filing of a Chapter 13 petition, a codebtor stay is established and a creditor is barred from commencing or continuing any civil action to collect all or part of a consumer debt of the debtor from a codebtor. 11 U.S.C. § 1301(a). The Bank argues that since Smith is not obligated on the promissory note nor a party to the original transaction, Smith is not a "debtor" with regard to the obligation and, therefore, the codebtor stay is inapplicable to bar collection efforts against Nero.

It is uncontroverted that Smith is not a signatory on the contract, and it is uncontroverted that Smith, not Nero, is currently the owner of the automobile, via the divorce decree, subject to the Bank's interest. The fact is, Smith owns the automobile subject to the Bank's interest, but is not personally obligated on the underlying debt, and Nero has no ownership interest in the automobile, yet is personally liable on the debt.

The first issue to be dealt with is whether, for purposes of 11 U.S.C. § 1301, the codebtor stay, a claim against the debtor's property and not against the debtor personally is sufficient to create a "debt" as defined in section 105(12). Debt means "liability on a claim". 11 U.S.C. § 105(12). The Bankruptcy Code broadly defines "claim" as a "right to payment, whether or not such right is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured". 11 U.S.C. § 105(5)(A).

The United States Supreme Court addressed the issue of a claim against the debtor's property without personal liability in Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150 (1991). In Johnson, the Chapter 13 debtor had previously discharged personal liability on a mortgage in a chapter 7 case, but retained the property which was the security for the mortgage. The creditor argued that since the debtor had no personal liability on the debt, and only the property was subject to the debt, the debt was not a "claim" of the debtor

to be reorganized in her Chapter 13 case. The Supreme Court stated that:

We have previously explained that Congress intended by this language to adopt the broadest available definition of "claim." See Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 558, 563-564, 110 S.Ct. 2126, 2130- 2131, 2133-2134, 109 L.Ed.2d 588 (1990); see also Ohio v. Kovacs, 469 U.S. 274, 279, 105 S.Ct. 705, 707, 83 L.Ed.2d 649 (1985). In Davenport, we concluded that " 'right to payment' [means] nothing more nor less than an enforceable obligation...." 495 U.S., at 559, 110 S.Ct., at 2131. [footnote omitted] Applying the teachings of Davenport, we have no trouble concluding that a mortgage interest that survives the discharge of a debtor's personal liability is a "claim" within the terms of § 101(5). Even after the debtor's personal obligations have been extinguished, the mortgage holder still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an "enforceable obligation" of the debtor.

Johnson, 501 U.S. at 83, 111 S.Ct. at 2154.

Following the analysis of Johnson, Smith has liability on the claim of the Bank of Nebraska and is a "debtor" of the Bank because the bank has a right to payment from the proceeds of the hypothetical sale of the car. Nero, then, is a codebtor, within the meaning of section 1301 and entitled to the codebtor stay regarding this consumer debt.

II Relief from Codebtor Stay

The Bank urges that it should be granted relief from the stay pursuant to section 1301(c)(1) and/or section 1301(c)(2).

A. Consideration Received by Codebtor

The Bankruptcy Code at 11 U.S.C. § 1301(c)(1), states:

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that -

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

11 U.S.C. § 1301(c)(1).

If Nero, the individual who is protected by the codebtor stay, received the consideration for the note, the Bank has a right to relief from the stay.

The evidence establishes that the Bank and Nero entered into an installment sales contract for the purchase of a 1989 Toyota Camry. Under the contract, the Bank advanced sums of money to Nero or on his behalf to the seller (Old Mill Toyota) to purchase the Camry. The contract required Nero to make forty-eight monthly payments in the amount of two hundred twenty-seven dollars and sixty-one cents (\$227.61). Title was issued to Nero, subject to First Lien of the Bank. Clearly, Nero received all of the consideration from the Bank.

Nero, in his affidavit, alleges that: the down payment was paid by Smith; all monthly payments have been made by Smith; and the Camry has always been in the possession of Smith. These assertions are uncontroverted and irrelevant. No arrangement Smith and Nero made for repayment of the loan, as between themselves, can change the fact that Nero and Nero alone received the consideration from the Bank.

B. Less than Full Payment in Plan

A creditor is entitled to relief from the codebtor stay if the plan proposed by the debtor does not propose to pay the claim of the creditor. 11 U.S.C. § 1301(c)(2). If the Chapter 13 plan does not propose to pay the full amount of the creditor's claim, including interest, the stay should be

lifted to that extent. See In re Pardue, 143 B.R. 434 (Bankr. E.D. Tex. 1992).

The confirmed plan does not propose to pay the full claim according to the terms of the contract because the plan modified, and reduced, the interest rate.

The determination that Nero received the consideration renders this portion of the Bank's motion moot because relief must be granted. However, even if Nero had not been the sole recipient of the consideration from the Bank, the Bank would be entitled to relief from the codebtor stay to seek the difference in the interest to be paid on the claim under the plan and the contract rate.

Conclusion

The Bank of Nebraska's motion for relief from the codebtor stay is granted under 11 U.S.C. § 1301(c)(1). To the extent that Nero is obligated to pay any or all the obligation to Bank, he will be permitted to file a late claim to protect his interest.

Separate journal entry to be filed.

DATED: December 11, 1997

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

PELSTER, MARTIN 390-9221
KNAUER-JOHNSON, TRACY 492-9336

Copies mailed by the Court to:

Albert Burnes, Attorney
Kathleen Laughlin, Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
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LILLIE M. SMITH,) CASE NO. BK97-80710
) A
DEBTOR(S)) CH. 13
) Filing No.
)
Plaintiff(s))
vs.) JOURNAL ENTRY
)
) DATE: December 11, 1997
Defendant(s)) HEARING DATE: December 1, 1997

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Bank of Nebraska.

APPEARANCES

Albert Burnes, Attorney for debtor
Tracy Johnson, Attorney for Nolan Nero
Martin Pelster, Attorney for Bank of Nebraska

IT IS ORDERED:

The Bank of Nebraska's motion for relief from the codebtor stay is granted under 11 U.S.C. § 1301(c)(1). To the extent that Nero is obligated to pay any or all the obligation to Bank, he will be permitted to file a late claim to protect his interest. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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