

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
MARYLOU KUNZ,	)	CASE NO. BK91-81374
	)	
DEBTOR	)	CH. 13

MEMORANDUM

Hearing was held on January 7, 1994, on the Motion for Relief filed by Frederick R. Malesa and John D. Haskett. Appearing on behalf of debtor was Howard Duncan of Omaha, Nebraska. Appearing on behalf of movant was Scott Rasmussen of Brown & Brown, Omaha, 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

Secured creditors, Frederick R. Malesa and John D. Haskett, moved this court to grant relief from the automatic stay on November 18, 1993, (Filing No. 74). In their Motion for Relief, secured creditors allege that the debtor has failed to make monthly mortgage payments on a timely basis every month since debtor filed her Chapter 13 plan on July 15, 1991, and that the debtor has failed to make payments for the months of July, August, September, and October, 1993, (see Filing No. 74 at 2).

Secured creditors' allowed claim is based upon a Loan Agreement entered into on November 18, 1988, which was secured by a Trust Deed. The debtor was to pay \$258.00 per month to the Beneficial Mortgage Company. The Loan Agreement stated that the payments would be due on the 23rd of each month. The mortgage company later assigned its interest in the loan and mortgage to the above-named secured creditors.

On May 14, 1992, this Court entered an Order which gave the debtor thirty days to cure all delinquency payments and late charges due to the secured creditor (Filing No. 39). The Order also denied secured creditors' Motion for Relief from the Automatic Stay, but provided that if the debtor was late making a monthly payment by more than ten days in the future, secured creditors would be entitled to relief from the stay upon the filing of an affidavit.

The debtor's Chapter 13 Amended Plan was confirmed by this

Court on November 12, 1992, (Filing No. 61). The plan provided that the secured creditors would be paid their monthly payments directly by the debtor and not through the trustee (Filing No. 55).

On August 4, 1993, secured creditors filed the Affidavit of John D. Haskett (Filing No. 66), which provided that pursuant to the Court's May 12, 1992, ruling (which has previously been designated as the May 14, 1992, Order by this Court) payments from the debtor became due on the 14th of each month instead of the 23rd due to the thirty-day provision in the Court's Order. As a result, the debtor was more than ten days delinquent on the July 1993, payment, which was received on July 26, 1993. The Court granted relief from the stay on August 11, 1993, (Filing No. 67).

The debtor asked the Court to reconsider its Order on September 9, 1993, (Filing No. 68). The debtor alleges that all payments are due on the 23rd of each month and not the 14th of each month and that the Court's Order did not change the original due date to the 14th. In addition, the debtor's attorney alleged that he did not receive a copy of or discover the filing of the Affidavit or the Court's Order granting relief until after he received a call from an individual who indicated that the stay was lifted and that a sheriff's sale of the property was going to take place on September 17, 1993.

The Court granted the debtor's Motion to Reconsider on September 14, 1993, (Filing No. 69). In addition, the Court vacated its previous Order granting relief. Secured creditors filed another Motion for Relief on November 18, 1993, reasserting the allegations referred to in the previously filed affidavit. The debtor resisted the Motion (Filing No. 79). The debtor alleges that all payments are current and that she is entitled to sanctions for attorney's fees and costs of this action because the secured creditors' motion is inconsistent and not factually correct.

### Decision

The Motion for Relief from the Automatic Stay is denied. The payment due date is the 23rd day of each month and, based on the evidence presented, the debtor is current on all mortgage payments. No sanctions shall be imposed on the creditors at this time.

### Discussion

#### A. Payment Due Date

The appropriate due date for the mortgage payments is the 23rd day of each month and not the 14th as alleged by secured creditors. The Loan Agreement entered into between the parties states that the 23rd day of each month will be the date that the payments are due.

Secured creditors' argument that the May 12, 1992, Order issued by the Court changed the due date to the 14th of each month is without merit. The Order states: "She must cure all delinquency and late charges within 30 days. If debtor fails to timely pay any monthly payment in the future, creditors may file an affidavit more than 10 days after the due date and relief will be granted." Secured creditors are arguing that the cure within thirty-days clause set thirty days after the Order was filed as the new due date. However, that clause only addressed the time for curing past delinquencies and did not address future payments. The next sentence in the Order addresses future payments, but that sentence does not alter the due date from the date in the Loan Agreement.

The Loan Agreement set the date payments were due to the secured creditors. Nothing in the plan varies the payment due date.

The Court has also noted that secured creditors have not consistently pled for the purposes of this motion that the due date was on the 14th. Secured creditors stated in the Affidavit and at the hearing that the due date was on the 14th of each month. However, in the motions for relief that secured creditors have filed on March 2, 1992, (Filing No. 32) and most recently in this current motion for relief that was filed November 18, 1993, (Filing No. 73), secured creditors allege that the due dates are on the 23rd of each month. The lack of consistency in pleading a due date raises the question of good faith on the part of the creditors.

#### B. Delinquent Payments

The second position secured creditors have taken in their motion is that debtor is delinquent on her July through October, 1993, payments. This Court has reviewed the evidence submitted at the hearing and finds that the debtor is current on her mortgage payments as of the date of the hearing. The Affidavit of MaryLou Kunz and the attached Exhibit 1 lists the check numbers and the dates that each check was paid. The Court finds this evidence sufficient to support the finding that the debtor is current on her mortgage payments.

The Court notes that secured creditors have contradicted themselves because the Affidavit of John D. Haskett submitted on August 4, 1993, states that the July payment was paid on July 26, 1993, while the Motion for Relief filed on November 18, 1993, states that the July payment was never made. The Court finds that the debtor's evidence coupled with the consistency of the debtor's position is more credible than the position of secured creditors; therefore, the Court holds that the debtor is current on her payments to secured creditors.

#### C. Sanctions

At this time, the Court will not grant sanctions to the debtor for secured creditors' alleged factual errors and inconsistent pleadings. However, the Court will grant the debtor sanctions in the future if secured creditors file a motion for relief that does not state a valid claim and causes the debtor to suffer needless expenses in resisting such motion.

D. Conclusion

The Motion for Relief from the Automatic Stay is denied. The debtors are obligated under the confirmed Amended Plan and pursuant to the Loan Agreement to pay secured creditors by the 23rd day of each month, not the 14th day. In addition, the Court finds that based upon the 23rd due date, the debtors are current on their monthly payments to secured creditors and are not delinquent on any payments. No sanctions will be imposed on creditors at this time.

DATED: January 27, 1994.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing  
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
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MARYLOU KUNZ,	)	CASE NO. BK91-81374
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 13
	)	Filing No.
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	
	)	DATE: January 27, 1994
<u>Defendant(s)</u>	)	HEARING DATE: January 7, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Frederick R. Malesa and John D. Haskett.

APPEARANCES

Howard Duncan, Attorney  
Scott Rasmussen, Attorney

IT IS ORDERED:

Motion for relief denied. Request for sanctions denied.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all  
parties appearing at hearing  
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.