

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
IRVIN TOYA,
Debtor.

No. 13-00-16699 SA

**MEMORANDUM OPINION ON
KEY BANK USA, N.A.'s MOTION TO LIFT
AUTOMATIC STAY AND TO LIFT CODEBTOR STAY**

This matter came before the Court for hearing on a Motion to Lift Automatic Stay and to Lift Codebtor Stay ("Motion") filed by creditor Key Bank USA, N.A. ("Key Bank") by its attorney William R. Keleher. Debtor objected and appeared through his attorney Raymond Sandoval. Codebtor Katherine Toya/Chinana¹ filed no response and did not attend the hearing. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G). The issue in this case involves the interrelationship between community property law and bankruptcy.

The facts are substantially undisputed². Debtor has a non-filing spouse, Katherine Toya. The debtor listed as an asset a 1997 Dodge, valued at \$15,000 and secured to Key Bank, which was owed \$22,000. Debtor's Chapter 13 plan proposes to

¹Debtor's schedules list the codebtor as Katherine Toya; the Motion and its notice refer to Katherine Chinana. The Court assumes that the same person is referred to.

² The parties stipulated to submit the issue on the court file and representations of counsel. To the extent this Memorandum Opinion fails to address any concern of a party, they are free to request a hearing on remaining issues.

value the Dodge at \$15,000 and pay for it through the plan with interest at 10%. The plan is not yet confirmed. Key Bank filed the Motion seeking relief from the automatic stay and codebtor stay. As grounds for the Motion, Key Bank asserts that there is no equity in the vehicle and that it is not adequately protected because debtor has not paid any adequate protection payments. It also asserts that the codebtor stay should be terminated because the plan does not provide for full payment of the debt, and that the Debtor's non-filing spouse is shown as the owner of the vehicle and that therefore she received consideration for the claim. Debtor denies the allegations regarding the non-filing spouse.

DISCUSSION

THE STAY MOTION

Section 362(d) of the Bankruptcy Code provides, in part:

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

...

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
[or]
(2) with respect to a stay of an act against property ...
if-

- (A) the debtor does not have an equity in such property; and
- (B) such property is not necessary to an effective reorganization.

The Court finds that the automatic stay should not be terminated with respect to the Debtor at this time. First, this Court regularly signs Orders for Adequate Protection in unconfirmed Chapter 13 cases that provide for payment to the secured creditor upon confirmation, conversion or dismissal. If the parties cannot agree on such an Order, including if Key Bank has concerns about when the adequate protection payments will begin, one or more of the parties should request a hearing and the Court will fix an amount for adequate protection. Furthermore, confirmation of the plan in this instance would presumably result in adequate protection. Cf. United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) (undersecured claims and time to confirmation). Confirmation was postponed pending the Court's ruling on the codebtor stay. Second, the Court finds that there is no equity in the vehicle (value \$15,000 with debt \$22,000), but cannot find that the vehicle is not necessary to an effective reorganization. If Key Bank wishes to present evidence on the necessity of the Dodge to Debtor's reorganization, it can request a hearing. In summary, the Court will deny the Motion for Relief from Automatic Stay without prejudice to Key Bank seeking further hearings.

THE CODEBTOR STAY MOTION

Bankruptcy Code Section 1301 contains the codebtor stay:

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, ...

(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;
- (2) the plan filed by the debtor proposes not to pay such claim; or
- (3) such creditor's interest would be irreparably harmed by continuation of the stay.

Key Bank alleges that Katherine Toya may have received all of the consideration and that under Section 1301(c)(1) the codebtor stay should be modified. Debtor disputed this in his objection. There is insufficient evidence to rule on these grounds at this time; if Key Bank wishes to present evidence on this issue, it should request a hearing.

Debtor's plan does not propose to pay Key Bank's claim in full. The plan writes the truck down to its value, \$15,000, leaving an unsecured balance of approximately \$7,000. Therefore, under a plain reading of Section 1301(c)(2) the codebtor stay should be terminated "to the extent that" the

plan does not pay the claim. Key Bank presumably should be free to collect the \$7,000 from the codebtor. See 1 Lundin, Chapter 13 Bankruptcy (3rd ed. 2000) § 88.1 at 88-1.

However, because New Mexico is a community property state, there are additional considerations. The codebtor in this case is a non-filing spouse. In New Mexico, assets acquired during marriage are presumed to be community property. Stroshine v. Stroshine, 98 N.M. 742, 743, 652 P.2d 1193 (1982); § 40-3-12 NMSA 1978 (1999 Repl.). Debts incurred during marriage are presumed to be community debts.

Huntington National Bank v. Sproul, 116 N.M. 254, 258, 861 P.2d 935, 939 (1993); Swink v. Sunwest Bank (In re Fingado), 113 B.R. 37, 42 (Bankr. D. N.M. 1990). Income earned by either spouse is presumed to be community property. Moore v. Moore, 71 N.M. 495, 499, 379 P.2d 784 (1963).

Bankruptcy Code section 1306 defines property of a chapter 13 estate:

(a) Property of the estate includes, in addition to the property specified in section 541³ of this title

- (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case ... and
 - (2) earnings from services performed by the debtor after the commencement of the case
- ...

In New Mexico, when one spouse files a bankruptcy, all community assets become property of the bankruptcy estate. 11 U.S.C. § 541(a)(2); Midi Music Center, Inc. v. Smith (In re Smith), 140 B.R. 904, 907 (Bankr. D. N.M. 1992); Fingado, 113 B.R. at 39. And, postpetition earnings by the debtor become property of the estate. 11 U.S.C. § 1306(a)(2); In re Suarez, 149 B.R. 193, 195 (Bankr. D. N.M. 1993).

The issue the Court must decide is whether post-petition earnings from services performed by a non-filing spouse in a community property state become property of the debtor's bankruptcy estate. If they do not, then Key Bank could pursue its codebtor relief directly against Katherine Toya and her post-petition wages. If they do, then the automatic stay

³ Section 541 provides that the estate contains, with few exceptions, all legal or equitable interests of the debtor in property as of the commencement of the case as well as all interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is under the sole, equal, or joint management and control of the debtor or liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and the debtor's spouse, to the extent so liable.

provisions would prevent Key Bank from pursuing the codebtor's post-petition wages. In either event, if "both spouses contracted or incurred the debt" Katherine Toya's separate property may be liable to satisfy Key Bank's claim. Section 40-3-11 NMSA 1978 (1999 Repl.)

In Moen v. Hull (In re Hull), 251 B.R. 726, 732 (9th Cir. B.A.P. 2000), the Bankruptcy Court found that the clear language of § 1306(a)(2) did not encompass services performed by a spouse. The Ninth Circuit Bankruptcy Appellate Panel specifically avoided this issue: "We need not address property of the estate further." Id. at 732. That court instead focused on "whether Hull's community property interest in the income of his non-debtor spouse is part of Hull's 'disposable income.'" Id. The court found that under Washington's community property law a husband had a one-half interest in a wife's income, and that this anticipated future income stream must be considered in determining disposable income. Id. at 733. No matter how the court characterized its ruling, the case probably stands for the proposition that, in Washington, at least one-half of a non-filing spouse's post-petition earnings are property of a chapter 13 estate.

The only other case on point the Court located⁴ was In re Reiter, 126 B.R. 961 (Bankr. W.D. Tx. 1991). The Texas court noted that § 1306(a)(2) did not apply because the earnings in question were not from services performed by the debtor. Id. at 965. The Court did find, however, that the debtor "acquired" her spouse's post-petition income under Section 1306(a)(1), because this income would have been liable for claims pursuant to Section 541(a)(2)(B). Id. This Court agrees with this reasoning.

The Court finds additional support for this result in the discharge language. If all payments are made, Chapter 13 ultimately results in a discharge. 11 U.S.C. § 1328. Section 524 describes the effect of that discharge. Section 524(a)(3) applies in community claims cases.⁵ "A discharge of the debts

⁴ 1 Lundin, Chapter 13 Bankruptcy (3rd ed. 2000) § 46.1 at 46-2-3 states "A nonfiling spouse's postpetition earnings are not property of the Chapter 13 estate and are not protected by the automatic stay notwithstanding that the nonfiling spouse's income may be essential to funding the debtor's Chapter 13 plan." and cites Goldsby v. United States (In re Goldsby), 135 B.R. 611 (Bankr. E.D. Ark. 1992). Arkansas is not a community property state, however. Id. at 614.

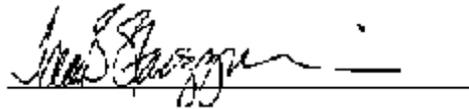
⁵ That portion of the statute provides in relevant part as follows:

"A discharge in a case under this title -
(3) operates as an injunction against the commencement or continuance of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the

then includes community claims and prohibits creditors from proceeding against community property acquired after the petition was filed even as against the nondebtor spouse." Smith, 140 B.R. at 907 (emphasis added). See also Burman v. Homan (In re Homan) 112 B.R. 356, 360 (9th Cir. B.A.P. 1990)(Section 524(a)(3) protects after-acquired community property from collection efforts by those creditors that held allowable community claims.); In re Karber, 25 B.R. 9, 12 (Bankr. N.D. Tx. 1982) (Creditors of either spouse holding community claims on the date of bankruptcy are barred from asserting those claims against after acquired community property.) The discharge, which prohibits collection from community property acquired after the filing of the petition does not become effective until its issuance, usually at the end of the case. Therefore, the automatic stay must protect the community property from the time of the petition, to preserve the benefit of the discharge. If the automatic stay and codebtor stay did not apply, a community creditor could proceed to collect the non-debtor's wages during the life of the chapter 13 plan, usually three to five years, substantially reducing or eliminating the value of the discharge as to community claims.

case, on account of any allowable community claim,..."

For these reasons, the Court finds that the codebtor stay should be modified to the extent of all amounts due in excess of \$15,000, provided, however, that Key Bank take no action to collect this debt from post-petition earnings of the codebtor as long as she remains married to the debtor.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 10, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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