

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

IN RE:

Derek A. F. Roberts II

Linda R. Roberts

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Case No.01-81072

**ORDER GRANTING MOTION TO LIFT STAY TO PURSUE MOTION FOR
SUMMARY ENFORCEMENT OF THE SETTLEMENT AGREEMENT**

This matter came on for hearing before the undersigned Bankruptcy Judge on the 19th day of July, 2001 in Durham, North Carolina on the Motion by High Country Bank, Inc. (hereinafter "HCB") and Julian W. Clark (hereinafter "Clark") for Relief from Stay to proceed with State Court action in the Superior Court of Watauga County, North Carolina to obtain summary enforcement of a settlement agreement and appearing before the Court were Richard M. Hutson, II Trustee; Michael D. West, Bankruptcy Administrator; William L. Yeager, Attorney for the Debtors; Anthony di Santi, Attorney for HCB and David Yates, Attorney for Clark. The court after having reviewed the files and after hearing the testimony of the witnesses and reviewing the evidence presented and having heard the arguments of the parties makes the following findings of fact pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

1. The Debtors filed a voluntary petition for relief under the provisions of Chapter 13 of the United States Bankruptcy Code on April 13, 2001. Richard M. Hutson, II is the duly appointed Trustee of the Debtors' Chapter 13 case.

2. The Debtors' schedules are not complete and fail to list all to the Debtors' real estate. The Debtors only listed a home place in Sanford, North Carolina and failed to list the following real property (1) 2.2 acres known as 1560 Lender Street; (2) 7.53 acres known as 1480 Winfield Street; (3) 17 Acres of land on property known as Lee Memory Gardens; and (4) 13 Acres of land on property known as Mount Larcon Memorial Park. The Debtors' schedules do not list all creditors as HCB, which contends it holds a valid claim for \$103,000.00, is not listed as a creditor. The Debtors failed to list several creditors including First Bank, Branch Banking and Trust and Kilmer Cheek, all of which hold Deeds of Trust of various parcels of real estate.

3. Prior to the filing of the Bankruptcy case, the Debtors were involved in two cases pending in Watauga County. The first is the Debtors vs. James March, Alma R. Marsh, John Brubaker, Trustee and High County Bank (Case No. 00-CVS- 417). The second is Julian W. Clark vs. Derek A. F. Roberts, Linda R. Roberts, James P. Marsh and Alma Marsh (Case No. 00-CVS-494). In March , 2001 a settlement conference was held and settlement documents were prepared including a nonwarranty deed from James P. Marsh, Sr. and Alma Ruth Marsh to a corporation owned by the debtors, Mount Lawn Memorial Park and Gardens, Inc. This Deed has been recorded in the public records. HCB and Clark contend that all the settlement documents were approved by the Debtors and their counsel. The Debtors have not executed the Settlement Documents which provide, among other things that the Debtors will execute Confessions of Judgment to HCB and Clark pursuant to rule 68.1 of the North Carolina rules of Civil Procedure and

that the confession of Judgment to HCB will be in the amount of \$193,807.00, plus interest at the rate of eight percent from August 24, 2000 and that the confession of Judgment to Clark will be in the amount of \$67,409.86, plus interest at the rate of eight percent from February 26, 2001. The judgments were to be held in escrow until the debt was paid and in the event of nonpayment, HCB and Clark were authorized to file the Confessions of Judgment in the Superior Court of Watauga County on March 8, 2002.

4. The Debtors did not execute the settlement documents prior to the filing of this bankruptcy petition and contend that the terms of the settlement were never finalized. HCB and Clark ask that the stay be lifted so that they may pursue a motion for summary enforcement of the settlement agreement in the Superior Court of Watauga County.

5. The Debtors list Professional Bankers Corporation as a creditor in their bankruptcy schedules. In the Debtors' proposed plan, the Debtors request that the judgment obtained by Professional Bankers (and other judgments obtained by creditors) be treated as an unsecured claim as there exists no equity in the Debtor's assets to which said judgment may attach. The Debtors have listed the debt to Professional Bankers Corporation at \$228,000.00. The Debtors have not listed this debt as contingent, unliquidated or disputed. The Debtors have listed other unsecured creditors in which they do not contend that the debts are contingent, unliquidated or disputed in the amount of \$46,355.66 resulting in total debt of 274,355.66.

6. The Debtors are not eligible for relief under Chapter 13, if on the date of the filing of their Petition, they owed non-contingent, liquidated unsecured claims in excess

of \$290,525.00.

DISCUSSION

Not every individual is permitted to be a debtor in a Chapter 13 proceeding. The code sets forth who may be a debtor in 11 U.S.C. §109. Pursuant to 11 U.S.C. §109 (e) only an individual with regular income that owes, on the date of the filing of the petition, non-contingent, liquidated, unsecured debts of less than \$269,250.00 may be a debtor under chapter 13. A debt is liquidated if it can be ascertained by reference to an agreement or simple computation. *In re Sitarz*, 150 B.R. 710 (Bankr. D. Minn. 1993). If it is determined that the Settlement Agreement between the Debtors and HBC and Clark should be enforced despite the fact that neither of the Debtors executed the documents, then these individuals do not qualify as Debtors under Chapter 13 as the amount of the non-contingent, liquidated unsecured debt exceeds that amount permitted in §109(e).

There is case authority to summarily enforce a settlement agreement: to wit

Harris v. Ray Johnson Construction Company, Inc., 139 N.C. App. 827, 534 S. E. 2d. 653 (2000); *Laing v. Lewis*, __ N. C. App. ___, 542 S. E. 2d. 301 (2001).

The movants have requested that the automatic stay of 11 U.S.C. §362 be lifted for “cause” under §362(d)(1). Cause is not defined under the statute but courts have determined that it is appropriate to lift the stay to allow a matter to proceed in state court where (1) the state court has special expertise in handling the matter, (2) judicial economy is promoted because the state proceeding may be completed quickly and inexpensively, and (3) the entry of the judgment in the state court does not harm the estate or the

interests of the other creditors because the bankruptcy court retains jurisdiction over the case. *In re Robbins*, 964 F.2d. 342 (4th Cir. 1992). The issues in dispute involve matters dealing with real property which the state court has expertise to resolve including whether to issue an order to set aside the deed that was recorded as part of the settlement. All parties to the law suit have counsel in or in close proximity to Watauga County and the entry of order will not harm the estate or the other creditors in the estate.

The court finds that there is cause under §362 (d)(1) to lift the stay to determine if the settlement should be enforced. If the state court decides that the settlement should be enforced then the result is that these Debtors no longer qualify to be in a Chapter 13 proceeding as they will have exceeded the amount of non-contingent, liquidated unsecured debt permitted under §109(e). If however, the state court determines that there is no settlement to be enforced then the Debtor will qualify under the debt limits in Chapter 13.

Based on the foregoing, IT IS ORDERED, ADJUDGED AND DECREED that the motion to lift stay is granted in order to pursue a motion for summary enforcement of the settlement agreement in the Superior court of Watauga County.

CATHARINE R. CARRUTHERS

UNITED STATES BANKRUPTCY JUDGE

Dated **AUG 01 2001**