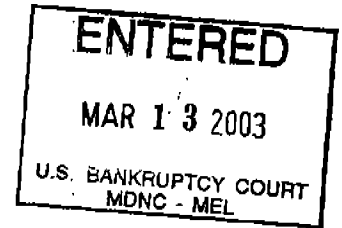


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)
)
Vincent Fernando Daniels,) Case No. 02-82083 13
)
Debtor.)
_____)

ORDER

THIS MATTER came on for hearing before the undersigned bankruptcy judge on February 25, 2003 in Durham, North Carolina upon Motion by First-Citizens Bank & Trust Company ("Creditor") for Relief From Co-Debtor Stay. Appearing at the hearing was Rhonda Bagshawe, on behalf of Vincent Fernando Daniels ("Debtor"), David Bridgman, on behalf of the Creditor, and Benjamin Lovell, on behalf of the Chapter 13 Trustee.

After considering the arguments of counsel and reviewing the file, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Debtor filed his petition under Chapter 13 of the Bankruptcy Code on July 15, 2002 and noted a co-signed debt with the Creditor showing a balance due of \$4,581.00. On May 30, 2001 the Debtor and Judge Haywood Alston ("Co-Debtor") executed a Promissory Note ("Note") with the Creditor for a principal amount of \$8,550 with an interest rate of 11.5 percent. The Note was not secured by any collateral and no evidence exists of any security interest held by the Creditor. The maturity date on the note is December 1, 2002.

The Debtor's Chapter 13 plan was confirmed on September 25, 2002 and the plan provided for a 25 percent dividend to all unsecured creditors. The Creditor filed an unsecured proof of claim in the amount of \$3,166.67. On October 15, 2002 the Chapter 13 Trustee filed a

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Motion based upon the Debtor's request to separately classify the Creditor's claim pursuant to 11 U.S.C. § 1322(b)(1), in order to protect the Co-Debtor by paying the Creditor's unsecured claim in full. An order was entered by the court granting the Trustee's motion on October 29, 2002.

On February 3, 2003, Creditor's counsel filed a Motion for Relief From Co-Debtor Stay in order to pursue collection efforts against the Co-Debtor. On February 18, 2003, the Debtor, through counsel, filed an objection to the Creditor's motion, stating that the motion should be denied as the Creditor would be paid in full under the Plan pursuant to section 1322(b)(1).

At the hearing, counsel for the Creditor stated that the Co-Debtor had recently become ill and is now in a nursing home. Debtor's counsel stated that the Co-Debtor had recently had a stroke. Counsel for the Creditor argued that due to the Co-Debtor's illness, the Creditor may be irreparably harmed by the plan treatment, because if the Debtor defaults in his payments to Creditor in the future, it may not be possible to pursue collection against the Co-Debtor. By contrast, if the stay was lifted, the Creditor could immediately collect in full on the matured Note against the Co-Debtor. Neither counsel for the Debtor nor the Creditor presented testimony or other evidence regarding the solvency or health of the Co-Debtor.

DISCUSSION

One of the more significant benefits of a Chapter 13 petition is the co-debtor stay under 11 U.S.C. § 1301. Like the stay under section 362, the co-debtor stay is automatic upon the filing of a bankruptcy petition and no further order is required to protect the co-debtor. The co-debtor stay automatically prohibits any act to collect monies from the co-debtor so long as the debt is a consumer debt and the co-debtor is not in the credit business. The underlying purpose of the co-debtor stay extends to benefit the debtor. Typically co-signers are relatives or close family friends of the debtor and if a creditor cannot pursue these individuals, it relieves the debtor of

pressure from those close to him. As the legislative history of section 1301 indicates, "[the co-debtor stay] is designed to protect a Chapter 13 debtor from indirect pressure from a creditor exerted through his friends or relatives, to favor or prefer that creditor." H.R. 595, 95th Cong., 1st Sess. 122 (1977). The co-debtor stay remains in effect until the Chapter 13 case is closed, dismissed or converted to Chapter 7 or Chapter 11, unless otherwise terminated.

Section 1301(c) set out three bases for terminating the co-debtor stay. If any one of the three grounds exists, the co-debtor stay will be lifted. The grounds are as follows:

- (1) the co-debtor stay will be lifted if the co-debtor and not the Chapter 13 debtor received the consideration for the claim;
- (2) the co-debtor stay will be lifted to allow the creditor to proceed against the co-debtor to the extent that the Chapter 13 plan does not propose to pay such claim; or
- (3) the co-debtor stay will be lifted as to the co debtor to the extent that "such creditor's interest would be irreparably harmed by continuation of such stay." 11 U.S.C. § 1301(c).

In the case at hand, the consideration for the claim was received by the Debtor and the Debtor proposes to pay the claim in full. Therefore the only issue for the court to address is whether the creditor's interest would be irreparably harmed by continuation of the stay. In this case, the Creditor argues it is irreparably harmed by receiving payments under the Debtor's Chapter 13 Plan rather than being able to immediately collect in full against the Co-Debtor. Additionally, the Creditor argues that he may be irreparably harmed in the event of future plan default if the Co-Debtor should be unavailable to collect against at that time.

Irreparable harm under section 1301(c)(3) cannot be shown merely by delay of payment. See Harris v. Ft. Oglethorpe State Bank, 721 F.2d 1052, 1054 (6th Cir. 1983). In Harris, the creditor bank wished to proceed against the co-signer of a promissory note when the debtor

proposed to pay the note in full through his Chapter 13 plan. The creditor argued that the delay of collection efforts against the co-signer may cause irreparable harm because in four years (the amount of time it may take for the plan to pay on the debt) the co-signer may be in bankruptcy or may have disappeared. The Sixth Circuit upheld the bankruptcy court's denial of relief from co-debtor stay and stated that the creditor must show more than "merely speculative fears that may or may not materialize." Id.

The legislative history of section 1301(c)(3) states that examples of irreparable harm are when "the co-debtor is deteriorating financially, by the loss of his job, or where the co-debtor is about to leave the jurisdiction, and would no longer be able to make good on the debt if the debtor were unable to complete payments under the plan." H.R. 595, 95th Cong., 1st Sess. 122 (1977). See also In re Butler, 242 B.R. 553 (Bankr. S.D. Ga. 1999) (delay in payment of postpetition interest insufficient to show irreparable harm); In re Beveridge, 2994 WL 127579 *3 (Bankr. N.D. Ohio 1994) (co-debtor's prostate cancer and declining net worth insufficient to show irreparable harm); In re Francis, 15 B.R. 998, 1004 (Bankr. E.D.N.Y. 1981) (creditor's fear of denial of claim in Chapter 13 insufficient to show irreparable harm).

In this case, counsel for the Creditor has made representations as to the Co-Debtor's health without producing any evidence. The creditor bears the burden of proof of showing the existence of irreparable harm. See In re Harris, 16 B.R. 371, 379 (Bankr. E.D. Tenn. 1982). An example of a creditor meeting this burden can be found in In re Case, 148 B.R. 901 (Bankr. W.D. Mo. 1992). In Case, the creditor was granted relief from the co-debtor stay for irreparable harm where the co-debtor died prior to the filing of the Chapter 13 and the decedent's estate was ready for distribution. The court held that if the relief were not allowed, the creditor would be subject to an unreasonable risk that the assets of the estate would be distributed. In re Case, 148 B.R. at

904. The case at hand presents a much different situation. Without any evidence presented that indicates the Co-Debtor would be unable to make future payments in the event the Debtor defaults, this court will not find that irreparable harm exists so as to warrant the lifting of the co-debtor stay.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that the Creditor's Motion for Relief from Co-Debtor Stay is hereby denied without prejudice.

This the 12 day of March, 2003.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge