UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re: **BK. NO. 90-22523**

RICHARD HARRY AMBUSH, **CHAPTER 13**

Debtor. **DECISION AND ORDER**

BACKGROUND

On November 21, 1990 the debtor, Richard Harry Ambush (the "Debtor"), filed a petition initiating a Chapter 13 case. In his Chapter 13 statement the Debtor listed Elma Ambush (his mother) as a co-debtor on a debt to the First National Bank of Rochester ("First National"). The debt to First National is listed as having an outstanding balance of $27,482.82 and as being secured by the residence of Elma Ambush. By Order dated April 11, 1991 the Debtor's Chapter 13 plan was confirmed. The plan provides for the sale of certain of the Debtor's real property within six months and for payments to the Trustee of $150.00 per month for six months and $500.00 per month thereafter.

On August 7, 1991 First National filed an unsecured proof of claim in the amount of $27,511.24.

By motion and notice of motion dated October 16, 1991 and made returnable on November 4, 1991, First National moved, pursuant to 11 U.S.C. §362(d), for an order terminating the automatic stay to allow it to foreclose on the residence of Elma Ambush. This motion was adjourned with the consent of the parties five separate times.

On December 23, 1991 the Court was advised that a consent order would be submitted. No consent order was ever submitted, and thereafter the matter was restored to the calendar on June 1, 1992 at the request of substitute counsel for First National. On May 28, 1992 a response was interposed on behalf of the Debtor asserting that no right to relief from the stay provided by 11 U.S.C. §1301 existed and requesting that relief from the automatic stay provided by 11 U.S.C. §362 be denied.

At the return date on June 1, 1992 the Court heard argument by the attorney for First National, the attorney for the Debtor and an attorney who appeared for the co-debtor, Elma Ambush. At that hearing it was asserted by First National that the debt in question was not a consumer debt since, upon information and belief, the proceeds of the loan were used by the Debtor in his business. The Court adjourned the matter to June 8, 1992 for First National to make a submission on the issue of whether the debt in question was a consumer debt. By supplemental affirmation filed with the Court on June 8, 1992, First National's attorney asserted that in a motion for relief from the Section 1301 co-debtor stay it is the debtor's burden to prove that the debt in question is a consumer debt. The attorney further asserted that First National was entitled to relief pursuant to the provisions of Section 1301(c)(2) to the extent that the plan filed by the Debtor does not propose to pay the claim of First National.

At the hearing on June 8, 1992 the Court was advised that First National had no further information or documentation on the issue of whether the debt in question was a consumer debt within the meaning of 11 U.S.C. §101(8). At the hearing all the parties agreed that the Debtor's confirmed plan did not propose to pay the First National claim in full. The attorneys for the Debtor and Elma Ambush indicated that their principal concern was that if the co-debtor stay were lifted, rather than to take other legally available steps to collect from the co-debtor, First National would actually proceed to foreclose on her residence, even though this 80-year-old mother of the Debtor had agreed to list her residence for sale and to renegotiate in good faith a repayment schedule with First National.

DISCUSSION

As finally presented on June 8, 1992, the Court will treat the motion of First National as a motion seeking relief from the co-debtor stay provided by 11 U.S.C. §1301 alternatively on the grounds that within the meaning of 11 U.S.C. §1301(a) the indebtedness due to First National is not

a consumer debt or that the stay should be lifted in accordance with 11 U.S.C. §1301(c)(2) to the extent that the Debtor's confirmed plan does not provide for the payment of the First National claim.

Section 1301, unlike Section 362, does not contain an express provision fixing burdens of proof. Absent any provision allocating the burden of proof, the normal rule is to place the burden on the moving party. Hence, the party seeking relief from the stay, in this case First National, must show that the grounds for relief exist. First National Exchange Bank vs. Myers (In re Burton), 4 B.R. 608, 611 (Bankr. W.D.Va. 1980); 5 Collier on Bankruptcy ¶1301.01[5] (15th ed. 1992). In this case First National has failed to meet its burden to prove that the debt in question is not a consumer debt or is a debt incurred by the co-debtor in the ordinary course of her business.

Section 1301(c)(2) provides that "The court shall grant relief from the stay . . . to the extent that (2) the plan filed by the debtor proposes not to pay such claim" (emphasis added). Here, as conceded by all of the parties at the hearing held on June 8, 1992, the Debtor's confirmed plan does nor provide for the payment of the claim of First National in full. Therefore to the extent, but only to the extent, that the plan does not provide for payment, the stay must be lifted. In re Johnson, 1 C.B.C.2d 547, 548 (Bankr. W.D.N.Y. 1980).

The Court notes that Elma Ambush is not without rights and remedies under state law and otherwise in connection with the First National debt and any foreclosure which might be commenced.

CONCLUSION

To the extent, but only to the extent, that the Debtor's plan proposes not to pay the claim of First National the stay provided by 11 U.S.C. §1301 be, and the same hereby is, terminated.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: June 19, 1992