UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE

MARGARET LOUISE HARRIS, **BK. NO. 93-21262**

Debtor.

BACKGROUND

On May 28, 1993, the Debtor, Margaret Louise Harris, (the "Debtor") filed a petition initiating a Chapter 13 case.

On her schedules, the Debtor indicated that she was indebted to Chemical Bank which held a purchase money security interest in her 1988 Four Winns Liberator boat (the "Liberator"). In her Chapter 13 statement, the Debtor set forth that she "was forced to file this Chapter 13 bankruptcy petition due to the unwillingness of Chemical Bank to accept a meaningful payment plan for the boat loan arrears." On June 21, 1993, Chemical Bank filed a secured proof of claim in the amount of $24,032.60.

A Section 341 meeting and hearing on confirmation were scheduled for July 7, 1993. Chemical Bank objected to the Debtor's original plan on various grounds, including the Debtor's proposed valuation of the Liberator. At the Section 341 meeting, the Debtor proposed a $15,635.00 value for the Liberator and further proposed to modify her plan to provide for monthly payments to the Trustee of $900.00 by wage order for a term of 4.5 years. It was estimated that this would result in Chemical Bank being paid the value of its allowed secured claim together with interest at 9% over the term of the plan and the unsecured creditors, including Chemical Bank on the unsecured portion of its claim, being paid 100% of their claims plus a 9% present value factor. At the hearing on confirmation, Chemical Bank agreed to the $15,635.00 valuation of the Liberator and withdrew its other objections to confirmation subject to the Court deciding its pending motion for relief from the

automatic stay with respect to the Liberator. The standing Chapter 13 Trustee (the "Trustee") recommended confirmation of the Debtor's plan, and the Court confirmed the plan as meeting all the requirements of Section 1325 but without prejudice to its decision on Chemical Bank's pending motion.

In its motion for relief from the stay, Chemical Bank asserts that the Debtor does not live on the Liberator which is not an income-producing asset but is simply a luxury item, and as such it is not necessary for an effective reorganization of the Debtor within the meaning of Section 362(d)(2)(B). Therefore, since there is no dispute that the Debtor has no equity in the Liberator and it is not necessary for an effective reorganization, an issue on which the Debtor bears the burden of proof, the stay should be lifted.[1]

Chemical Bank further asserts that cause exists under Section 362(d)(1) to terminate the automatic stay in that, prepetition when the Debtor was in arrears and Chemical Bank was attempting to obtain payments or a surrender of the Liberator, the Debtor's boyfriend, who does repossession

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[1] Section 362(d) provides:

> 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, such as by terminating, annulling, modifying, or conditioning such stay–
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> (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 under subsection (a) of this section, if–
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> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

work, had advised an officer of Chemical Bank that it would never see the Liberator again. Chemical Bank suggests that this raises serious concerns about its ability to realize on its security interest in the Liberator should there be further defaults in payment by the Debtor and the stay is lifted, or there is a dismissal of the case. This allegation was supported by an affidavit of Walter Kroan, Jr. of Chemical Bank, who asserts that the Debtor's boyfriend made these statements to him over the telephone. However, the Debtor's attorney in his July 30, 1993 affidavit says the boyfriend denies making this statement. This is a denial which interestingly is not included in the boyfriend's own affidavit of the same date filed in opposition to the Chemical Bank motion.

In its response to the Chemical Bank motion, the Debtor reconfirms that her reason for filing Chapter 13 was to propose and have confirmed a plan which would pay Chemical Bank's claim so that she could retain the Liberator when all of her out of court negotiations with Chemical Bank to arrive at an acceptable settlement for the repayment of her arrearages had failed. The Debtor asserts that Chemical Bank is adequately protected by: (1) Chemical retaining its security interest in the Liberator (New York is a title certificate state); (2) the Debtor's having the Liberator insured for more than the amount of the Chemical Bank claim with the Bank named as a loss payee, which is not a requirement under the existing retail installment agreement; (3) Chemical Bank being paid its allowed secured claim in full with interest in accordance with the provisions of Section 1325(a)(5); and (4) Chemical Bank being paid the undersecured portion of its claim in full with a 9% present value factor. The Debtor further asserts that under the confirmed plan Chemical Bank will receive full payment of its claim sooner than under the original agreement between the parties which would not result in full payment until August 11, 2000.

As to the necessity of the Liberator for an effective reorganization, the Debtor contends that the retention of the Liberator is the raison d'etre for the Chapter 13 proceeding and for the Debtor's willingness to make the efforts necessary to pay all of her creditors in full together with a present

value factor over a reasonable and relatively short period of time.[2] The Debtor points out that this is clearly an amount which exceeds what the creditors would receive in a Chapter 7 liquidation and under a three year Chapter 13 plan using all of the Debtor's disposable income even if she surrendered the Liberator to Chemical Bank, and it filed a deficiency claim.

The Trustee also interposed an answer opposing Chemical Bank's request for relief. The Trustee asserts that should the Court find that Section 362(d)(2)(B) does apply in Chapter 13, the question of whether a secured asset is necessary for an effective reorganization should be determined on a case by case basis, and the standard utilized should be more flexible in a consumer Chapter 13 case than in a Chapter 11 case or Chapter 13 case which is not a strictly consumer case but includes some commercial elements. Further, the Trustee asserts that the Court should not allow the stay to be lifted pursuant to Section 362(d)(2)(B) under circumstances where to do so would thwart an effective Chapter 13 reorganization of a consumer debtor where such a reorganization is feasible; the plan is in the best interests of all creditors and the debtor; and the interest of the secured creditor in the collateral is otherwise adequately protected. In this case, the Chapter 13 Trustee contends that there is an effective reorganization of the Debtor within the meaning of Section 362(d)(2)(B) since the Debtor's plan, which will pay all of the creditors in full with a present value factor, has been confirmed by the Court as meeting all of the requirements of Section 1325, including that it is feasible; Chemical Bank's interest in the Liberator has been adequately protected; and Chemical Bank will be paid in full on terms more favorable than its original agreement with the Debtor.

DISCUSSION

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[2] If the Debtor had filed simply to delay and frustrate Chemical Bank's rights and remedies as a secured creditor without proposing a feasible plan which treated Chemical Bank and the Debtor's other creditors so fairly, the Court might find the filing to retain a luxury item not to be in good faith.

The initial question presented by the parties to the Court for decision is whether Section 362(d)(2) applies in Chapter 13 cases which are arguably debt adjustment cases rather than reorganization cases. Although the courts are split on this issue, this Court believes that those cases which hold that Section 362(d)(2) is applicable in Chapter 13 cases represent the more well-reasoned view. *See In re Garner*, 18 B.R. 369, 371 (S.D.N.Y. 1982); *In re Scott*, 121 B.R. 605, 608 (Bankr. E.D.Okl. 1990); *In re Ruark*, 7 B.R. 46, 49 (Bankr. D.Conn. 1980). However, this Court believes that whether a secured asset is necessary for an effective reorganization within the meaning of Section 362(d)(2)(B) is a fact intensive question which must be determined on a case by case basis and that the standard utilized should be more flexible in a consumer Chapter 13 case than in a Chapter 11 case or a Chapter 13 case which is not a strictly consumer case but which includes some commercial elements.

In this case, the secured asset, the Liberator, is clearly a luxury item. This Court has a very strong policy of closely scrutinizing Chapter 13 plans where the debtor proposes to retain a luxury item such as a boat, recreational vehicle or vacation property to insure that the debtor's retention of such a luxury item is not at the expense of the debtor's creditors. In such cases, the Court requires that the debtor and the trustee perform a careful financial analysis of the option of surrendering the luxury item and the impact of such a surrender, including any resulting deficiency, on the ultimate repayment to creditors. Depending upon the detailed financial analysis of the various options, debtors may be required to adjust their budgets to demonstrate that the amounts being repaid to retain the luxury item are not reducing the amounts which would otherwise be available to other creditors. When debtors are required to adjust their budgets, they are afforded the continuing option of surrendering the luxury item at any time during the term of the plan and reducing the monthly plan payment accordingly. In this case, the Debtor's confirmed Chapter 13 plan proposes to pay all of the

creditors in full, including unsecured creditors who will also receive a present value factor of 9% over the term of the plan, and meets all of the Court's concerns with respect to the retention of a luxury item.

As to whether the Liberator is necessary for an effective reorganization within the meaning of Section 362(d)(2)(B) in this consumer Chapter 13 case, the Debtor asserts that it is the retention of the Liberator which is the driving force behind her plan. This is an extension plan rather than a composition plan which will pay Chemical Bank in full on terms more favorable than its contractual payment terms while clearly adequately protecting Chemical Bank's secured interest in the Liberator during the term of the plan. Furthermore, it provides for the payment of the Debtor's other creditors in full. Based on an analysis of the liquidation value of the Debtor's non-exempt assets, this would not occur in a Chapter 7 case or in a Chapter 13 case with a three year plan using all of the Debtor's disposable income, if the Liberator was surrendered or repossessed by Chemical, Chemical sold it and a claim was filed for a deficiency. As such, this is an effective reorganization which is in the best interests of the Debtor and all of her creditors, and the retention of the Liberator is necessary to it.

In this case, the Court agrees that this Debtor has presented a plan for an effective reorganization, which has been confirmed by the Court as meeting all of the requirements of Section 1325, including that it is feasible. The confirmed plan clearly furthers the underlying policy of Congress in providing a Chapter 13 debt adjustment chapter to encourage debtors to pay all or more of their debts than they could or would otherwise pay either in a Chapter 7 liquidation case or outside of bankruptcy. As such, the driving force behind the Debtor's plan, the retention of the Liberator, is necessary to the reorganization within the meaning of Section 362(d)(2)(B) on all of the facts and circumstances of this unusual case.

CONCLUSION

The motion by Chemical Bank for relief from the automatic stay pursuant to Sections 362(d)(1) and 362(d)(2) is hereby denied. However, to insure that the interest of Chemical Bank as a secured creditor is adequately protected, if the Debtor does not maintain insurance on the Liberator at all times in an amount at least equal to the outstanding indebtedness of Chemical Bank and with Chemical Bank named as a loss payee, the stay shall terminate. Furthermore, this Chapter 13 case shall not be dismissed pursuant to Section 1307(b) unless and until the Liberator is surrendered to Chemical Bank or Chemical Bank otherwise consents to the dismissal.

IT IS SO ORDERED.

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

Dated: August 12, 1993

An analysis of the Debtor's schedules indicates that the realizable liquidation value of her non-exempt assets in a Chapter 7 case would be approximately $13,407, representing $420 in non-exempt bank deposits and $12,987 in non-exempt equity in her residence ($68,700 scheduled value less an outstanding mortgage of $40,904 less a hypothetical 7% cost of sale ($4809) and a $10,000 homestead exemption). The total due to the unsecured creditors other than Chemical Bank on a possible deficiency scheduled by the Debtor is $9,373.10.