

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

JOSEPH A. PETRO and
CATHY L. PETRO

BK 90-13864 K

Debtors

MEMORANDUM OF DECISION
AND
ORDER

I reserved decision in this matter to consider whether 11 U.S.C. § 362(d) relief is available to a secured creditor in a Chapter 13 case in which a Plan has been confirmed and in which payment of the secured claim is provided for under the Plan, but where the debtor has fallen into arrears in payments to the Chapter 13 Trustee. At hearing I queried whether the creditor's only available relief might be to move for conversion or dismissal of the case.

The parties have briefed the question.

I am persuaded by the creditor's brief and cases cited therein that section 362(d) relief is available.

Where, as here, a secured creditor does not file an "Acceptance" of a Plan (11 U.S.C. § 1325(a)(5)(A)) that does not provide for continuation of the lien, the lien must be continued by virtue of 11 U.S.C. § 1325(a)(5)(B)(i). Consequently, despite 11 U.S.C. § 1327(a), such creditor does retain a security interest which it may seek to enforce.

The basis upon which relief is sought -- a failure to make payments to the Chapter 13 Trustee for distribution to the secured (and other) creditors -- is appropriate. Lack of "adequate protection" would not be an appropriate basis, since the provisions of a confirmed plan bind all creditors provided for by the plan (11 U.S.C. § 1327(a)), and any insufficiency of plan payments in compensating for depreciation, etc., of collateral, may not be complained of other than by Motion to compel a modification of the plan or Motion to convert or dismiss.

The "Cause" which warrants lifting of stay in such cases as this is the failure to make the payments to the Trustee provided for by the plan.

The debtor's explanation of such failure and expectation of cure has yet to be received.

This matter is restored to the Calendar and will be heard at 11:30 a.m. on December 27, 1991.

Dated: Buffalo, New York
December 16, 1991

U.S.B.J.