UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

WILLIAM G. SANFILIPPO Case No. 92-10296 K

Debtor

This motion for Relief from Stay was dated by counsel two days after this Chapter 13 petition was filed. The motion was filed three days after that.

Although the creditor-mortgagee alleges arrears of $8,295.79 and the pendency of a foreclosure action, that is not the principal basis of the motion, for that is not an uncommon situation and sophisticated creditors such as this typically await a § 341 meeting and confirmation hearing to determine the prospects of cure of arrearages and prospects of future payment.

Rather, at argument counsel agreed that the crux of the present motion is the fact that the debtor is a debtor in two cases pending here (and the creditor is a creditor in each, in the same capacity).

The first was a Chapter 7, filed on November 17, 1989. In that case there apparently are assets and the Trustee is in the process of resolving claims. There is no allegation that the debtor failed to co-operate in that case or otherwise contributed to the fact that that case is still open.

The current case is a Chapter 13, filed on January 29, 1992.

Apparently each filing stayed a pending foreclosure.

In the earlier case the debtor did not reaffirm his mortgage debt and was discharged. Consequently, he has no personal liability for arrears -- only the property is so liable. In this regard the creditor argues that the debtor therefore "has no liability for the arrears ... that could be paid through a Chapter 13 Plan." This argument is clearly without merit since the Supreme Court has recently and conclusively decided that precise issue in the case of *Johnson v. Home State Bank* 501 U.S. _____, 115 L.Ed.2d 66, 111 S.Ct. 2150 (1991).

In that case the Supreme Court also held that "Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief." Thus, successive filings are not grounds , vel non, to disapprove grant of confirmation of a Chapter 13 Plan.

The only novel questions presented in the matter at Bar are (1) is the holding of *Johnson* vitiated in any way by the fact that the earlier case is still pending, and (2) does the filing of a so-called "Chapter 20" (i.e., a Chapter 7 followed by a Chapter 13), allegedly intended to thwart foreclosure, of itself constitute "cause" to lift stay (even if the *Johnson* case commands that Plan confirmation not be denied on that ground alone).

(1) Here the two petitions were more than two years apart. There is no allegation that the debtor obstructed the administration of the earlier estate. He was discharged in that case on March 14, 1990. He cannot be faulted for the fact that

there were assets in his estate to be administered.

(2) The second question is more substantial. In the *Johnson* case, the District Court and Circuit Court had resolved against the debtor the question of whether the in rem claim of a mortgage was a "claim" subject to inclusion in a Chapter 13 Plan. The Supreme Court reversed. Consequently, the Court remanded the questions of "good faith" and "feasibility" of the Plan at its Bar.

The question of the ultimate confirmability of a proposed Chapter 13 Plan may, in certain instances, be pertinent to resolution of a § 362(d) motion that is filed prior to the confirmation hearing.

The opening paragraph of the *Johnson* decision is provocative in this regard. It states:

"The issue in this case is whether a debtor can include a mortgage lien in a Chapter 13 ... plan once the personal obligation secured by the mortgaged property has been discharged in a Chapter 7 proceeding. We hold that the mortgage lien in such a circumstance remains a 'claim' against the debtor that can be rescheduled under Chapter 13." 115 L.Ed.2d at 72 (emphasis added).

And the Court emphasized that "any or all" of various Code provisions "designed to protect Chapter 13 creditors," in the Court's language "may be implicated when a debtor files serially under Chapter 7 and Chapter 13." Id. at 77.

The Supreme Court has thus suggested that although successive filing is not prohibited on "claims" grounds, it might

be an element in a "good faith" analysis.

For § 362(d) purposes, I am not willing to conclude that successive filings more than two years apart, each in the midst of a pending foreclosure proceeding, of itself suggests the absence of good faith that might preclude the confirmability of a Plan.

The motion is denied, without prejudice.

Dated: Buffalo, New York
February 26, 1992

/S/ MICHAEL J. KAPLAN
U.S.B.J.