

UNITED STATES BANKRUPTCY COURT

FILED
U.S. BANKRUPTCY COURT
DISTRICT OF HAWAII

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DISTRICT OF HAWAII

In re)
) Case No. 02-00211 ✓
) Chapter 13
 FERNIE S. NICOLAS,)
)
)
 Debtor.)
)
)

**MEMORANDUM CONCERNING
FIRST HAWAIIAN BANK'S MOTION FOR RELIEF
FROM AUTOMATIC STAY AS TO DEBTOR AND CO-DEBTORS**

ENTERED ON DOCKET
MAR 22 2002

I. INTRODUCTION

First Hawaiian Bank's Motion for Relief from Automatic Stay as to Debtor and Co-Debtors ("Motion"), filed February 27, 2002, came on for a preliminary hearing on March 20, 2002. Jonathan W.Y. Lai, Esq., appeared for Movant First Hawaiian Bank ("FHB"); Blake Goodman, Esq., appeared for Debtor Fernie S. Nicolas.

The Motion seeks relief from the automatic stay imposed by 11 U.S.C. § 362 and the codebtor stay imposed by 11 U.S.C. § 1301, to permit FHB to enforce its rights against Debtor and Codebtors Isaias Cabanero and Rebecca N. Cabanero ("Codebtors") as to a certain 2001 Toyota Corolla, VIN 1NXBR12EX1Z504462 ("Corolla"). At the hearing, the parties reported that they were close to an agreement resolving FHB's request for relief under 11 U.S.C. § 362(d), but raised, for the first time, the issue of the applicability of the codebtor stay.¹ The parties briefly argued the point and the court took the matter under advisement. The court will grant the Motion, to the extent that it is determined that FHB is not stayed from enforcing its

¹FHB, in its moving papers, did not claim that the chapter 13 stay did not apply. Rather, FHB simply asserted that it would be irreparably harmed by continuation of the codebtor stay. Memorandum in Support of Motion, filed February 27, 2002, at 7.

rights in the Corolla against Codebtors. The following shall constitute findings of fact and conclusions of law, pursuant to Fed. R. Bankr. P. 7052.

II. FACTUAL BACKGROUND

The facts are undisputed. Debtor commenced this case with the filing of a voluntary petition under chapter 13 of the Bankruptcy Code on January 17, 2002. Debtor lists one of his several occupations as a "drivers' educator." See Schedule "I", filed January 17, 2002. On January 19, 2001, Debtor and Codebtors, Debtor's brother and sister-in-law, executed a credit sales contract for purchase of the Corolla from Servco Pacific Inc. dba Waipahu Auto Chevrolet. The contract apparently was assigned to FHB. A copy of the certificate of title issued March 2, 2001 indicates that the registered owner is "FERNIE S NICOLAS DBA FSN DRIVING SCHOOL" and that FHB is the lienholder. See Declaration of Monte M. Mitchell, Exhibit "B", filed February 27, 2002. Debtor also testified at the meeting of creditors that he purchased the Corolla for use in the driving school business. At the March 20, 2002 hearing, Debtor's counsel acknowledged that the debt incurred in the Corolla purchase was a business obligation of Debtor. At the time the motion was filed, it appears that the Corolla loan was in default, with a prepetition delinquency of \$352.47 and a postpetition delinquency of \$347.47.

FHB argues that the codebtor stay of § 1301(a) does not apply here because the subject debt is not a "consumer debt" as stated in that Code section. Debtor insists that the statutory provision need not be read strictly. Further, Debtor asserts that the codebtor stay should remain in effect to protect Debtor because his proposed plan provides for full payment of the secured portion of FHB's claim, with interest.

III. DISCUSSION

This is a contested matter in bankruptcy. See Fed. R. Bankr. P. 4001(a) & 9014.

This also is a core proceeding under 28 U.S.C. § 157(b)(2)(G), and this court has jurisdiction over the matter under 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and LBR 1070-1(a).

The filing of a petition under chapter 13 stays a creditor from acting:

to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

- (1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or
- (2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

11 U.S.C. § 1301(a). Section 1301 “is designed to protect a debtor from operating under a chapter 13 individual repayment plan case by insulating him from indirect pressures from his creditors exerted through friends or relatives that may have cosigned an obligation of the debtor.”

H.R. Rep. No. 95-595, 95th Cong., 2nd Sess. 426, reprinted in 1978 U.S.C.C.A.N. 5787, 5963,

6381. Congress nevertheless limited the codebtor stay protection to collection of consumer debt.

The automatic stay under this section pertains only to the collection of a consumer debt, defined by section 101(7) [now 11 U.S.C. § 101(8)] of this title to mean a debt incurred by an individual primarily for a personal, family, or household purpose. Therefore, not all debts owed by a chapter 13 debtor will be subject to the stay of the codebtor.

Id. (quoted in In re Stovall, 209 B.R. 849, 852 (Bankr. E.D. Va. 1997)).

Thus a threshold issue in considering the application of § 1301(a) is whether the subject debt is a “consumer debt.” In re Janssen, 220 B.R. 639, 642 (Bankr. N.D. Iowa 1998); In re Whitelock, 122 B.R. 582, 586 (Bankr. D. Utah 1990). The chapter 13 codebtor stay does not

come into play where the debt is not such debt. See In re Westberry, 215 F.3d 589 (6th Cir. 2000) (holding income and withholding tax debt not consumer debt); accord In re Stovall, 209 B.R. 849, 852 (Bankr. E.D. Va. 1997). The Code defines the term “consumer debt” as that debt incurred by an individual “primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8). “It is settled in this circuit that the purpose for which the debt was incurred affects whether it falls within the statutory definition of ‘consumer debt’ and that the debt incurred for business ventures or other profit-seeking activities does not qualify.” In re Hill, 268 B.R. 548, 552-53 (Bankr. 9th Cir. 2001) (citing In re Kelly, 841 F.2d 908, 913 (9th Cir. 1988)). This “profit motive” rule is the general standard. See In re Booth, 858 F.2d 1051, 1055 (5th Cir. 1988) (stating when “credit transaction involves a profit motive, it is outside the definition of consumer credit”); see also In re Runski, 102 F.3d 744 (4th Cir. 1996). The determination of whether a debt relates to a personal, family, or household purpose or is motivated by profit-seeking is made at the time the debt is incurred. In re Bertolami, 235 B.R. 493, 497 (Bankr. S.D. Fla. 1999) (holding mortgage debt incurred for residence to be consumer debt, notwithstanding later conversion to commercial use).

It is clear that Debtor purchased the Corolla for use in his driving instruction business, with an eye toward profit. Debtor has acknowledged through counsel that the debt to FHB is a business obligation. The debt was not incurred for personal, family, or household use and is not a consumer debt. Therefore, under the plain language of the statute, the stay provided under § 1301(a) does not apply to any act by FHB to collect from Codebtors on the Corolla loan.

Debtor urges the court to overlook the statutory language on “consumer debt” to achieve an equitable result and to further a policy of protecting a chapter 13 debtor attempting a

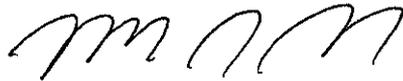
good faith repayment plan. The court declines this invitation to construe congressional intent where the plain language of the statute is unambiguous. See United States v. Ron Pair Ent., Inc., 489 U.S. 235, 242 (1989).

IV. CONCLUSION

There are no undisputed facts and it is determined as a matter of law that the debt to FHB is not a consumer debt within the meaning of 11 U.S.C. § 1301(a). The Motion will be granted to the extent that it is held that the codebtor stay does not apply to FHB in any collection action on the Corolla loan against Codebtors. This ruling in no way affects the automatic stay imposed by 11 U.S.C. § 362(a) with respect to Debtor and property of the estate. A final hearing on relief from the automatic stay will be held on April 8, 2002, at 9:30 a.m. The automatic stay of 11 U.S.C. § 362(a) shall remain in effect until the conclusion of the final hearing.

Dated: Honolulu, Hawaii,

MAR 22 2002



Robert J. Faris
United States Bankruptcy Judge

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CERTIFICATION OF SERVICE
I HEREBY CERTIFY THAT THE ATTACHED
ORDER/JUDGMENT WAS MAILED ON
3/22/02 TO THE ABOVE
NAMED PARTIES IN INTEREST.

O. Mahala
DEPUTY CLERK