IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

IN RE: MARK CLARK **4:02-bk-10963 E**
CHAPTER 13

ORDER GRANTING MOTION FOR RELIEF FROM STAY

On August 20, 2002, the Court heard First State Bank's Motion for Relief From Automatic Stay. First State Bank ("**FSB**") appeared through its attorney, Matthew W. Adlong. Debtor appeared through his attorney, David K. Lester of the Dickerson Law Firm. Natasha Graf, Esq. was also present on behalf of the standing Chapter 13 Trustee, Joyce B. Babin. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G), and the Court has jurisdiction to enter a final judgment in this case.

Debtor filed his chapter 13 plan (the "**Plan**") on March 4, 2002, along with a Notice of Opportunity to Object stating that any objections must be filed within 20 days from the date of the notice. The Plan provided that the Debtor would continue to make contract payments to FSB on the Motor Coach through the Trustee's office as a long-term debt and provided for a monthly payment of $200.00 on the pre-petition contract arrearage. The Court notes that the Debtor's attorney failed to certify that the notice was mailed to creditors other than those specifically listed on the notice which did not include FSB, and accordingly, there is no proof that FSB received notice. No objections were filed, and the Plan was confirmed on May 24, 2002. The confirmation order provided for monthly payments of $2,635.18. On behalf of the Chapter 13 Trustee's office, Ms. Natasha Graf testified that as of the date of the hearing, Debtor had made one $1,500 payment in June and one $1,500 payment in July.

FSB filed its Motion for Relief From Automatic Stay on July 19, 2002, alleging that Debtor

failed to make payments in his chapter 13 plan and failed to maintain insurance on a 2000 Motor Coach which is the collateral securing FSB's claim. At the hearing on this matter, FSB also asserted, and the Debtor admitted, that Debtor has not paid the sales tax on the Motor Coach and has not had it licensed even though it has been in the Debtor's possession for 22 months. Additionally, FSB asserted that Debtor has no equity in the vehicle and that the vehicle is not necessary to Debtor's reorganization.

Relief from the automatic stay may be granted under 11 U.S.C. § 362(d)(2) if a debtor has no equity in the subject property, and the property is not necessary to the debtor's reorganization. Here, the Debtor does not dispute that he lacks equity in the 2000 Motor Coach, and the Debtor's testimony demonstrates that the vehicle is not necessary to his reorganization. The Debtor testified that he has not driven the vehicle in approximately 20 months because of the licensing problem and because his business is down. Nevertheless, the Debtor testified that the vehicle is necessary for his reorganization because he has several alternative business plans which require the vehicle's use which will hopefully come to pass early next year. The Court finds the vehicle is not necessary to Debtor's reorganization because the Debtor has not used the vehicle in 20 months and has only speculative plans for its future use. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 376 (1988) (a debtor must show that there is "'a reasonable possibility of a successful reorganization within a reasonable time'") (citations omitted).

FSB also moves for relief from stay "for cause" under 11 U.S.C. § 362(d)(1) alleging that Debtor has defaulted in making his plan payments and has failed to insure and license the 2000 Motor Coach. The Debtor is in default in his plan payments as evidenced by Ms. Graf' s testimony. Furthermore, the Debtor has not provided adequate proof of insurance. Sam Spears,

a loan officer at FSB, testified that the bank had insured the vehicle with Southern Pioneer Insurance for an annual premium of $19,399.00. Debtor testified that he obtained insurance on the vehicle August 19, 2002, the day before the hearing on this matter. Debtor introduced a Temporary Insurance Identification Card showing that the vehicle was insured by Progressive Casualty Insurance Co. ("**Progressive**") into evidence and a receipt indicating that he had paid a $309.00 premium to Progressive. Although the identification card does not state the deductible or coverage on the vehicle, Debtor testified that there is a $1,000 deductible and the vehicle is "covered for everything." While the Debtor submitted proof that he has obtained some insurance for the vehicle, the best evidence of the amount and type of insurance was not introduced into evidence, and the evidence presented did not prove that the vehicle was adequately insured. The Court does not credit the Debtor' s testimony that the insurance " covers everything," especially in light of Mr. Spears' testimony that the bank paid an annual insurance premium of over $19,000.00. Finally, the Debtor has admitted that he has failed to pay sales tax on the vehicle and has failed to have it licensed even though it is has been in his possession for 20 months. The Debtor testified that he has not driven the vehicle in approximately 20 months because of the licensing problem and because his business is down. The Debtor testified that he has some alternative plans for licensing the vehicle. The Court finds these plans to be highly speculative.

At the hearing on this matter, the Court raised the issue of the binding effect of Debtor's confirmed chapter 13 plan on FSB's post-confirmation motion. Because the issue of Debtor's equity in the vehicle and its necessity to Debtor's reorganization could have been raised during the confirmation process, and FSB did not file an objection to the Plan's confirmation and has not appealed the order confirming the Plan, FSB would normally be barred from doing so at this time

under 11 U.S.C. § 1327(a) and by principals of *res judicata*. *See In re Simpson*, 240 B.R. 559 (B.A.P. 8th Cir. 1999) (confirmed plan serves as *res judicata* as to claims that were or could have been decided in the confirmation process)*; In re Evans*, 30 B.R. 530 (Bankr. 9th Cir. 1983) (section 1327(a) bars post-confirmation relief from stay based on grounds arising before confirmation). Post-confirmation defaults are not considered in the confirmation process and are therefore not subject to *res judicata* flowing from the confirmation order. *Id.* Likewise, where a creditor's collateral is not adequately protected following confirmation of the chapter 13 plan, relief from stay may be appropriate. *See In re Barnes*, 125 B.R. 484 (Bankr. E.D. Mich. 1991) (granting motion for relief from stay post-confirmation where collateral not insured).

Although there is no proof before the Court that FSB received notice of the confirmation of Debtor's plan such that principals of *res judicata* would apply, FSB has not alleged that it failed to receive notice of the Plan's confirmation, and the Court declines to make any ruling with respect to whether FSB is entitled to relief from stay for grounds that could have been alleged before the Plan's confirmation. Such an inquiry is not necessary because the Court finds that FSB is entitled to relief from stay for cause under section 362(d)(1) for grounds arising post-confirmation. Specifically, the Court finds that FSB is entitled to relief from stay for cause due to Debtor' s failure to make plan payments, failure to license the vehicle and failure to provide adequate proof of insurance.

For the reasons stated herein, FSB's Motion for Relief from Automatic Stay is **GRANTED**.

IT IS SO ORDERED.

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HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED:_____

cc: Mr. David K. Lester, attorney for Debtor
Mr. Matthew W. Adlong, attorney for FSB
Ms. Joyce Bradley Babin, Chapter 13 Trustee
U.S. Trustee