

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at _____ O'clock & _____
JAN 17 2003
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (7)

IN RE:

Richard R. Knox,

Debtor.

C/A No. 02-13517-W

ORDER

Chapter 7

ENTERED
JAN 17 2003
M.P.

THIS MATTER comes before the Court on the Motion to Modify Stay filed by Key Bank USA, N.A. ("Key Bank") on December 18, 2002 (the "Motion"). Richard R. Knox ("Debtor") filed an objection to the Motion on December 23, 2002. The Chapter 7 Trustee has declared the case a no asset case by his filing of a Trustee's Report of No Distribution on December 19, 2002. In this case, the automatic stay will terminate upon the discharge of Debtor or closing of the case pursuant to 11 U.S.C. §362(c) which is likely to be on or about February 12, 2003.¹

Debtor objects to the Motion on two grounds. Initially, Debtor asserts that he is not in default under the loan documents with Key Bank either because he is current in payments or as a result of an extension in payments ("Extension of Payments") provided by Key Bank. Debtor argues that Key Bank's Motion should not be granted if he is not in default. Secondly, Debtor argues that Key Bank's Motion and the accompanying Certification of Facts requests relief pursuant to §362(d)(1) and not §362(d)(2) and that Key Bank does not meet the requirements of §362(d)(1).

As to the initial issue, the Court believes whether a debtor is in default under the loan documents is one of many factors it should consider when deciding a motion for relief from the automatic stay pursuant to §362(d), however, default in payment is not a controlling factor or a

¹ Further references to the Bankruptcy Code shall be by section number only.

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condition precedent that must be met before relief can be granted. There is no statutory requirement of default as a condition precedent to a creditor's motion for relief, and Debtor presents no case authority standing for that proposition.

Debtor and Key Bank also differ on whether Debtor made and Key Bank received a payment of \$667.00 that, according to Debtor, was made by phone check on or about October 30, 2002. Additionally, while Debtor admits that he has not made the payment due on January 8, 2003, he relies upon a "preapproved" agreement to extend payment as represented in a letter from Key Bank dated September 12, 2002. Debtor testified that he accepted the extension by signing and returning it by mail to Key Bank on a date of which he is uncertain.

The Court finds that Debtor may not rely on the Extension of Payment in this matter because he failed to demonstrate that he fully met the conditions of the agreement. By its terms, the Extension of Payment required Debtor to submit "the executed deferment letter and hardship letter explaining the situation" and "satisfactory evidence of monthly net income in an amount no less than \$2,500.00" to be "received within five days" or the Extension was void. There is no convincing proof that Debtor met those conditions or that the Extension of Payment became effective.

The Court further finds that Debtor appears to be in default according to the terms of paragraph 6(B) of the Balloon Note attached to the Motion because Debtor has not timely made the January 8, 2003 payment and has a history of untimely payments according to the Certification of Facts.

Therefore, Debtor's objection, based on the argument that he is not in default under the loan documents and that such default is a condition precedent to the Court's granting of the Motion, is overruled.

Debtor next argues that the Motion should not be granted pursuant to §362(d)(2), which provides for relief if a debtor has no equity in the subject property and the property is not necessary for an effective reorganization. Because this is a Chapter 7 case, there is no reorganization proposed; consequently, the latter of the two requirements is met. As to the existence of equity, the parties' Certifications of Facts show equity of \$775.00 after deduction for the liens on the property and before considering Debtor's exemption. It is noteworthy that the Chapter 7 Trustee has not objected to the Motion, apparently having concluded that there is no equity for the benefit of the estate. While it is an interesting issue whether the existence of any equity, no matter how slight, would require the denial of a motion based on §362(d)(2), courts have held that the presence of marginal or de minimis equity does not prohibit the granting of such a motion. See Royal Bank de Puerto Rico v. Figuero Ruiz (In re Figuero Ruiz), 121 B.R. 419, 423 (D. P.R. 1990), Shearson Lehman Hutton Mortgage Corp. v. Hundley (In re Hundley), 103 B.R. 768, 770 (Bankr. E.D. Va. 1989).

Furthermore, this Court has previously held that, in the context of a motion under §362(d)(2), the presence of equity must be such as to be of benefit to the unsecured creditors. See In re Rye, 54 B.R. 180, 182 (Bankr. D. S.C. 1985) (citing First Fed. Sav. & Loan Ass'n v. Shriver (In re Shriver), 33 B.R. 176, 187 (Bankr. D. Oh. 1983)). Therefore, the Court finds that Key Bank can meet the requirements of §362(d)(2) to receive relief from the stay.

However, Debtor argues that Key Bank did not properly plead §362(d)(2) as the basis for its Motion and therefore relief cannot be presently granted based on that section. A review of the Motion and Key's Certification of Facts indicates that while Key Bank pled a lack of equity, the prayer of its Motion and, more importantly, its Certification of Facts indicate that it asserted its Motion only on the grounds enumerated in §362(d)(1). Since parties in this District should be able

to strictly rely on the Certification of Facts, a form required by this Court's Local Rules to eliminate unnecessary issues, the Court agrees with Debtor on this point and finds that under its present pleadings, Key Bank is not entitled to relief pursuant to §362(d)(2).

Key Bank's Motion does rely upon §362(d)(1) which provides relief for cause, including a lack of adequate protection. Key Bank cites two cases for the proposition that absent the Chapter 7 Trustee's determination of equity in the property and objection for relief, a debtor should not be allowed to object to relief based on §362(d)(1). See In re Davenport, 266 B.R. 787, 789 (Bankr. W.D. Ky. 2001); In re Cohen, 141 B.R. 12 (Bankr. D. Mass. 1992). This Court understands those authorities if a debtor is relying on the presence of equity above the lien of the moving creditor as a means of adequately protecting the moving creditor. However, Debtor apparently is not relying on such an equity, but is relying on the fact that he is, or can be in short order, current in payments as a means of adequate protection. Therefore, the Court finds the authority cited by Key Bank is distinguishable.

Considering the totality of circumstances and evidence before the Court, it **ORDERS** that:

The automatic stay under the circumstances before the Court shall remain in effect subject to the following conditions:

- 1) For receipt **on or before January 22, 2003**, Debtor shall make the January payment due under the loan documents to Key Bank by delivery of the payment in cash or certified funds directly to counsel for Key Bank (or at such address and location as provided by Key Bank's counsel in writing). All future payments shall also be made in the same manner on the due date of the eighth day of each month. Upon failure to timely pay according to this Order, Key Bank may submit an affidavit of

noncompliance and present an Order granting relief from stay that will be considered without further hearing.

- 2) Key Bank shall review its records for the payment of \$667.00 testified to by Debtor and report to Debtor's counsel in writing whether it has any record of the receipt of the payment **on or before January 30, 2003**. Likewise, Debtor shall initiate a trace or other inquiry with the issuer of the phone check to determine if it was received by Key Bank, and Debtor's counsel shall report in writing the results of that effort to counsel for Key Bank **on or before January 30, 2003**. The Court will consider the status of the \$667.00 payment at the further hearing set below.
- 3) Key Bank may amend for filing and service its Motion and Certification of Facts to add §362(d)(2) as a basis of its Motion, if it chooses to do so, **on or before January 24, 2003**. Any amendment must be served upon Debtor's counsel by hand delivery, telefax, or overnight delivery on the day of its filing with the Court. Debtor may respond to any such amendment by filing and serving by hand delivery, telefax, or overnight delivery on counsel for Key Bank an Objection and Certification of Facts **on or before February 5, 2002**.

A further hearing on the Motion shall be held on **February 11, 2003 at 9:30 a.m. in the J. Bratton Davis United States Bankruptcy Court, 1100 Laurel Street, Columbia, South Carolina.**

AND IT IS SO ORDERED.

Columbia, South Carolina,
January 17, 2003.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

✓ ✓ ✓
JAN 17, 2003
(Cox) (RH)
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE
SHEREE R. PHIPPS
Deputy Clerk

✓ [Handwritten Signature]