UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Donald L. Drawdy and Kristina M. Drawdy,

Debtor.

C/A No. 01-04844-W

JUDGMENT

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion for Relief from Stay is denied.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 20, 2001.

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:

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

SHEREE R. PHIPPS

Deputy Clerk

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 01-04844-W
Donald L. Drawdy and Kristina M. Drawdy, Debtor.	**ORDER**
	Chapter 13

THIS MATTER comes before the Court for hearing on the Motion of GreenPoint Credit ("GreenPoint") seeking relief from the automatic stay pursuant to 11 U.S.C. §362(d).[1]

At the hearing on the Motion, testimony and evidentiary exhibits were presented to the Court. In its Motion, GreenPoint argues that a prior State Court Order ("State Court Order") to which the parties consented contains a provision whereby Donald L. Drawdy and Kristina M. Drawdy ("Debtors") waived any right to object to GreenPoint's Motion for Relief from the Automatic Stay. Further, GreenPoint argues that Debtors did not comply with the State Court Order, and, as a result, GreenPoint is entitled to repossess the Debtors' mobile home. Finally, GreenPoint argues that the State Court Order is res judicata regarding the issues addressed therein and that Debtors are barred by the Rooker-Feldman Doctrine from seeking any relief in this Court inconsistent with the terms of the State Court Order.

In response, Debtors argue (1) the State Court Order was conflicting and ambiguous; (2) rather than stating a forbearance agreement, it stated an illegal prohibition against their filing bankruptcy; (3) they substantially complied with the terms of the agreement; (4) there were superseding agreements made by the parties with which they also substantially complied and

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

(5) GreenPoint's actions made their full compliance with the terms of the superseding agreements impossible. Finally, they argue that this Court's July 2, 2001 order confirming Debtors' Plan bars the relief GreenPoint seeks in its Motion.

Based upon the pleadings and evidence before it, the Court makes the following Findings of Fact and Conclusions of Law.[2]

FINDINGS OF FACT

1. The Court has jurisdiction over the parties and issues raised in GreenPoint's Motion for Relief from the Automatic Stay and the Debtors' Objection to that Motion.

2. Debtors purchased a 1996 Oakwood mobile home, serial number HNOC02230490A&B, by way of a retail installment contract and security agreement with GreenPoint. Thereafter, Debtors failed to make timely payments under the contract and, as a result, GreenPoint instituted a claim and delivery action seeking possession of the mobile home in the state court.

3. To resolve that action, the parties entered into a consensual State Court Order on April 10, 2001:

a. The State Court Order recites: "Defendants [Debtors] have now requested Plaintiff [GreenPoint]to allow them to reinstate the Contract. Plaintiff is willing to allow the reinstatement, provided that, any future default by Defendants will result in Plaintiff's right to repossess its collateral without having to institute another action and without Defendants being allowed to prevent Plaintiff's possession by filing a bankruptcy petition." (emphasis added).

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[2] The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

b. Paragraph 2 of the State Court Order sets forth Debtors' total delinquency balance, including attorney's fees, in the amount of $2,665.79. Paragraph 2 also refers to crediting an amount of $1,400.00, thereby leaving a delinquency balance of $1,265.79. Paragraph 4 of the State Court Order sets forth a payment schedule with $851.79 due on March 28, 2001, $817.67 due on April 6, 2001, $819.67 due on May 6, 2001, and $611.67 due on June 6, 2001.

c. Paragraph 7 of the State Court Order states: "If Defendants [Debtors] fail to pay the Plaintiff [GreenPoint] the sums referred to above, or if the Defendants thereafter fail to make monthly installments within 15 days of the due date, Plaintiff's counsel may file with the Clerk of Court an affidavit to that effect. Upon receipt of a filed copy of the affidavit of Plaintiff's counsel, the [State] Court will issue its Order without further notice to the Defendants authorizing the sheriffs of South Carolina to take immediate possession of the 1996 Oakwood mobile home . . ."

d. Paragraph 8 of the State Court Order states: "Defendants stipulate and consent that, upon the filing of a petition under any section of Title of the United States Code, or similar law or statute, by or against Defendants, Defendants shall not contest any motion or application by Plaintiff made in any court of competent jurisdiction seeking enforcement of the Order, or otherwise seeking modification or termination of an automatic stay or other injunction. Defendants acknowledge and agree that Plaintiff is specifically relying upon the representations, warranties, covenants and agreements [sic] constitute a material inducement for Plaintiff to allow Defendants to reinstate the Contract and for Plaintiff to consent to the terms of the Order."

4. *By way of money order dated March 23, 2001, Debtors paid GreenPoint*

$1,400.00. In addition, Debtors timely made their March 28 payment of $851.79.

5. On or about April 5, 2001, GreenPoint, apparently unilaterally, began the processes of returning the $1,400.00 to Debtors from GreenPoint's corporate headquarters. According to the testimony of GreenPoint's representative, once GreenPoint decided to return the $1,400.00, the decision could not be revoked, and the process of returning Debtors' money would take "four to six weeks."

6. Debtors failed to make their April 6, 2001 payment on time, but on April 20, 2001, Debtors submitted $820.00 to GreenPoint by wire transfer. This payment was made within the fifteen day grace period provided in paragraph 7 of the State Court Order. GreenPoint promptly returned to Debtors the money that Debtors paid to it on March 28, 2001 and on April 20, 2001.

7. On or about April 24, 2001, GreenPoint agreed that Debtors could reinstate the loan by paying GreenPoint approximately $3,940.00 by May 6, 2001, a Sunday.

8. On May 7, 2001, Debtors wired $2,540.00 to GreenPoint. GreenPoint did not accept this sum and returned it to Debtors the next day.

9. By check dated May 10, 2001, GreenPoint also returned to Debtors the $1,400.00 payment. Debtors received this refund check on May 15, 2001.

10. After May 7, 2001, GreenPoint attempted to repossess Debtors' mobile home. However, due to Debtors' May 9, 2001 bankruptcy filing, the repossession did not occur.

11. Both Debtors' original and amended Chapter 13 Plans provided for the resumption of regular monthly payments directly to GreenPoint beginning in June 2001 and the payment of arrearage amounts over approximately forty-eight months. Other than the provisions

concerning the payment of arrearages, Debtors did not attempt to modify the terms of the contract and the security agreement. The Plan provides a 4% dividend to unsecured creditors.

12. Since the filing of their Chapter 13 Bankruptcy, Debtors have made timely plan payments to the Trustee and timely "outside of the plan" monthly payments to GreenPoint.

13. On June 27, 2001, GreenPoint filed its Motion seeking relief from the automatic stay. Subsequently, on July 2, 2001, GreenPoint filed an Objection to Confirmation of the Plan filed by Debtors alleging that the Plan in which Debtors would retain the mobile home and cure any default over a period of forty-eight months should not be confirmed because of a lack of good faith, stemming from Debtors agreement to the State Court Order.

14. This Court held a confirmation hearing in this case on July 2, 2001. Neither GreenPoint nor its counsel appeared to prosecute its objection and, as a result, an order indicating that the Plan will be confirmed if the Trustee recommends confirmation was entered on July 12, 2001. No final order of confirmation has yet been entered.

ISSUES

I. Whether the Court is barred by the res judicata effect of the State Court Order or the Rooker-Feldman doctrine from denying GreenPoint's Motion for Relief from the Stay?

II. Whether the waiver of stay provision as an agreement of the parties is controlling in this matter?

III. Whether Debtors are in default under the State Court Order and forbearance agreement with GreenPoint?

IV. Whether GreenPoint's failure to prosecute its objection to confirmation of Debtors' Plan bars it from relief from stay?

DISCUSSION

I. Whether the Court is barred by the res judicata effect of the State Court Order or the Rooker-Feldman doctrine from denying GreenPoint's Motion for Relief from the Stay?

Res judicata, also known as claim preclusion, provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter that was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter that might have been offered for that purpose. See Estate of Samson v. Ward (In re Ward), 194 B.R. 53, 56 (Bankr. D.S.C. 1995) (citing Comm'n of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948)). Previously, in determining whether a matter might or should have been advanced in the first litigation, this Court found that, to have claim preclusion, the three following conditions must be satisfied: (1) a prior judgment must be final and on the merits and rendered by a court of competent jurisdiction in accordance with the requirements of due process; (2) the parties must be identical or in privity in the two actions; and (3) the claims in the second matter must be based upon the same cause of action involved in the earlier proceeding. See In re The Roof Doctor, Inc., No. 97-01648 (Bankr. D.S.C. Aug. 25, 1998) (citing In re Varat Enterprises, Inc., 81 F.3d 1310, 1315 (4th Cir. 1996)).

The Court must also consider the application of the Rooker-Feldman doctrine in the context of dealing with the State Court Order. This doctrine bars lower federal courts from undertaking appellate review of state court decisions. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). When determining whether the doctrine applies, the federal court must consider whether the

federal action seeks redress of an injury caused by the state court judgment, or whether the federal action presents a claim independent of the state court decision. See Young v. Murphy, 90 F.3d 1225, 1231 (7th Cir. 1996); Levin v. ARDC, 74 F.3d 763, 766 (7th Cir. 1996), cert. denied, 116 S. Ct. 2553 (1996); GASH Assoc. v. Village of Rosemont, Ill., 995 F.2d 726, 728 (7th Cir. 1993). If, in its federal action, the federal plaintiff is attempting to redress an injury caused by the state court judgment and the issues raised in the federal complaint are "inextricably intertwined" with the state court action so that, in effect, the federal plaintiff is attempting to have the state court judgment set aside, the Rooker-Feldman doctrine applies, and the federal court must dismiss the federal action. See GASH Assoc., 995 F.2d at 728; FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840-41 (3d. Cir. 1996). However, if the federal plaintiff presents an independent claim, then the federal case is not inextricably intertwined, and the federal action can proceed. See Garry v. Geils, 82 F.3d 1362, 1365-66 (7th Cir. 1996); GASH Assoc., 995 F.2d at 728.

Upon a review of the State Court Order and the circumstances under which it was entered, this Court finds that it is not barred from considering and ruling upon GreenPoint's Motion for Relief from Stay or Debtors' objection thereto for the following reasons.

Initially, it appears that according to the language of the State Court Order, the waiver of stay provision is intended to operate only in the event of Debtors' future default under the contract. As stated below, this Court finds Debtors were not in default under the contract as modified immediately prior to their filing of bankruptcy. Therefore, according to its terms, the waiver provision is not enforceable at this time.

Secondly, the waiver provision in this case does not represent the State Court's

determination under federal law that the automatic stay is not applicable to a matter before it for determination. The provision, more like a contract provision or forbearance agreement, merely purports to bind Debtors in the future event of a Motion for Relief from Stay being filed before this Court. It has also been generally recognized that a determination to grant relief from the stay, as opposed to a determination of the stay's applicability to a matter before it, is not a matter for a state court but is a core matter under 28 U.S.C. §157(b)(2)(G) and that only the bankruptcy court in which the bankruptcy case is pending has original jurisdiction to lift, annul or modify the stay. Farley v. Henson, 2 F.3d 273, 275 (8th Cir. 1993); In re Gruntz, 202 F.3d 1074, 1082 (9th Cir. 2000). In this case, the waiver provision contained in the State Court Order does not and cannot command this Court to grant or deny GreenPoint's motion. Under different facts, the Rooker-Feldman doctrine could apply. Had Debtors defaulted and upon proceeding to enforce the State Court Order, Debtors filed bankruptcy and the State Court then decided that, due to the waiver provision, the automatic stay did not apply to its proceedings to enforce its Order and thereafter Debtors sought review by this Court, the Rooker Feldman doctrine may be controlling.[3] However, here the federal claim associated with relief from the automatic stay was not actually and necessarily litigated in the State Court. Therefore, the issues of relief from the automatic stay or Debtors' objection thereto were not inextricably intertwined with the subject of the State Court Order.

Finally, most courts, as did this Court in In re Darrell Creek Associates, L.P. and In re Riley, have found that, even when a waiver provision is enforceable, it is not self-executing, but

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[3] There is no indication that the State Court actually considered the applicability of the automatic stay nor required the waiver provision; in viewing substance over form, the provision is merely an agreement of the parties and should be so treated by the Court.

is a primary element to be considered by the bankruptcy court in determining if cause exists for relief from the automatic stay. "The existence of the waiver does not preclude third parties, or the debtor, from contesting the motion [for relief from the automatic stay]". In re Powers, 170 B.R. 480, 484 (Bankr. D.Mass. 1994). For all of these reasons, the Court may determine this matter without prohibition due to the State Court Order.

II. Whether the waiver of stay provision as an agreement of the parties is controlling in this matter?

Citing In re Cheeks, GreenPoint argues that this Court should uphold the State Court Order provision as, at least, a pre-petition forbearance agreement and ignore Debtors' objection. In Cheeks, the court upheld a forbearance agreement where a debtor elected to forego one benefit of the bankruptcy code in exchange for the creditor's forbearance. See In re Cheeks, 167 B.R. 817, 820 (Bankr. D.S.C. 1994). In addition, while the court noted that enforcement of forbearance agreements were not automatic, the Court refused to hear the debtor's objection to the enforcement of its agreement. See id.

Subsequent to Cheeks, the Court has examined other pre-petition forbearance agreements and their enforceability in bankruptcy proceedings. These other rulings spawned additional factors the Court considers in determining whether relief from the stay because of a pre-petition forbearance agreement is appropriate. These factors include the following: (1) whether the affected party understood the terms and consequences of the waiver of stay, (2) the benefit the debtor received from the workout agreement, (3) the loss of consideration or potential prejudice to the creditor if the waiver is not enforced, (4) the effect of enforcement on other creditors, (5) the likelihood of a successful reorganization, (6) public policy that favors pre-petition workouts

outside of bankruptcy, (7) objections by other parties to the relief from the stay, and (8) the waiver as a means of inducing the creditor to surrender enforcement rights. See In re Riley, 188 B.R. 191, 192-93 (Bankr. D.S.C. 1995); In re Darrell Creek Assoc., L.P., 187 B.R. 908, 913-915 (Bankr. D.S.C. 1995).

Examining these factors in the context of the circumstances surrounding the execution of the State Court Order, in the nature of a pre-petition workout agreement, the Court notes that the waiver provision could be enforceable. First, the Court notes that public policy favors pre-petition workouts outside of bankruptcy. See Cheeks, 167 B.R. at 819. Additionally, based on its review of the evidence and testimony, the Court finds that Debtors made an informed and freely rendered decision in entering the State Court Order as a forbearance agreement. Moreover, Debtors benefitted from the workout agreement as it provided them a means of paying arrearages and avoiding further repossession action by GreenPoint in state court. Finally, the Court also notes that no other creditors nor the trustee objected to GreenPoint's seeking relief from the stay.

However, a central remaining question before the Court is whether the waiver provision is enforceable regardless of whether Debtors comply with the terms of the workout agreement. Indeed, in In re Riley, this Court refused to enforce a pre-petition forbearance agreement and consequently denied relief from the automatic stay where the debtor was not in default of the pre-petition agreement. See 188 B.R. at 193. Because this factor is germane, the Court will examine the parties' performance of the forbearance agreement, and, in doing so, reject GreenPoint's argument that a waiver provision in a forbearance agreement, standing alone, controls this matter. See Darrell Creek, 187 B.R. at 912 (noting that a waiver of stay is not self-executing but is a primary element that demonstrates cause exists for relief from the stay).

III. Whether Debtors are in default under the State Court Order and forbearance agreement with GreenPoint?

The evidence indicates that the State Court Order set forth specific payment requirements, and, upon Debtors' difficulty in making payments, GreenPoint and Debtors modified the payment terms by an effective agreement. This modification occurred on or about April 24, 2001, when GreenPoint agreed to provide Debtors until May 6, 2001, a Sunday, to pay a total of approximately $3,940.00 in order to reinstate the contract.

Written contracts may be modified orally. See King v. PYA/Monarch, Inc., 453 S.E.2d 885, 889 (S.C. 1995); Adamson v. Marianne Fabrics, Inc., 391 S.E.2d 249, 251 (S.C. 1990). Modifications, however, must satisfy all requisites of a valid contract. See Player v. Chandler, 382 S.E.2d 891, 893 (S.C. 1989). The requisites of a valid contract include offer, acceptance, and valuable consideration. See Roberts v. Gaskins, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Applying these rules to the case at bar, the Court believes that the parties indeed modified their agreement. Initially, the parties agreed to the payment schedule delineated in Findings of Fact ¶ 3; however, the parties agreed to depart from these terms on or about April 24, 2001. The new agreement provided for Debtors to make a one-time payment of approximately $3,940.00 by May 6, 2001, to reinstate the contract. Debtors accepted GreenPoint's offer, evidenced by Debtors submitting payment to GreenPoint on May 7, 2001, the first business day after May 6, 2001. Finally, this modification was supported by consideration as GreenPoint received an increased payment which included its attorney fees in exchange for making this offer available to Debtors.

Finding that the parties modified their agreement, the Court next examines whether this agreement was performed or breached. As of May 7, 2001, the first business day after May 6 and

therefore the deadline for payment, GreenPoint received a $2,540.00 wire payment from Debtors. In addition, GreenPoint still had in its possession $1,400.00 from a prior payment by Debtors. Because of this evidence, the Court finds Debtors should not be deemed to be in default under the terms of the modified forbearance agreement; consequently, GreenPoint was incorrect in seeking to repossess the mobile home on May 7, 2001 or thereafter.

Because Debtors were not in default of the modified forbearance agreement at the time of their bankruptcy filing, the Court is not inclined to grant relief from the stay based upon the agreement's waiver provision. First, the Court notes that such forbearance agreements are not self-executing. Moreover, this Court previously held that the fact that a debtor was not presently in default under the forbearance agreement was important in the Court's decision not to grant relief from the stay and a factor which distinguished it from Cheeks. See Riley, 188 B.R. at 193 (Bankr. D.S.C. 1995). Finally, based upon its conduct in this matter, the Court finds that GreenPoint should be estopped from asserting default for a failure to pay by May 6, 2001.

Any further argument that Debtors should be compelled to comply with the payment schedule set forth in the State Court Order or the modified forbearance agreement as opposed to some other means of, or timetable for, curing default pursuant to §1322 or under a good faith analysis was an issue to be considered at the Confirmation Hearing on Debtors' Plan. However, GreenPoint did not pursue that basis for objection to Debtors' Plan.

IV. *Whether GreenPoint's failure to prosecute its objection to confirmation of Debtors' Plan bars it from relief from stay?*

Debtors' Plan filed July 2, 2001 was considered for confirmation on July 10, 2001. GreenPoint filed an objection to confirmation of the Plan on July 2, 2001 upon the ground that

the Plan had not been filed in good faith because Debtors had agreed not to oppose relief from the stay in the State Court Order and therefore GreenPoint's claim should not be paid through the Plan. At the confirmation hearing, GreenPoint failed to appear to prosecute its objection which was therefore overruled, and the Trustee then recommended that a confirmation order be entered upon his submission of such an order. To date, no confirmation order has been entered and therefore the binding effect of the Plan pursuant to §1327 has not yet been triggered. Additionally, because Debtors' Plan does not address the State Court Order or the waiver of stay provision specifically, the Court is not inclined to view the confirmation of the Plan as barring GreenPoint's Motion for relief from the stay.[4]

However, because GreenPoint may not now object to confirmation of the Plan, Debtors may cure any default to GreenPoint as provided for in the Plan and that fact mitigates against and is inconsistent with granting relief from the stay to GreenPoint at this time.

CONCLUSION

For the reasons stated above, the Motion for Relief from Stay is denied.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 20, 2001.

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[4] The Court does not now consider whether GreenPoint's failure to prosecute its objection to confirmation could otherwise be determined to be a waiver or grounds upon which it would be estopped to raise certain arguments made in connection with this Motion.