

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:)	
)	
TIMOTHY CLARKE DANIELS)	Case No. 00-11863-SSM
)	Chapter 13
Debtor)	
)	
TIDEWATER FINANCE COMPANY)	
)	
Movant)	
)	
vs.)	Contested Matter
)	
TIMOTHY C. DANIELS <i>et al.</i>)	
)	
Respondents)	

MEMORANDUM OPINION AND ORDER

Before the court is a proposed order tendered by Tidewater Finance Company (“Tidewater”) terminating the co-debtor stay with respect to Jacqueline M. Daniels. Tidewater filed its motion for relief from the co-debtor stay on August 1, 2002, and no response has been filed.

The automatic stay of creditor activity that arises upon the filing of a bankruptcy petition normally protects only the debtor and does not extend to other persons that may be liable on the debt, such as co-signers, guarantors, and endorsers. Congress has provided a limited exception to this rule in chapter 13 cases, however. Specifically, a creditor is stayed during the pendency of the chapter 13 case from proceeding against a non-debtor party on a consumer debt. § 1301(a), Bankruptcy Code. However, the co-debtor stay may be

terminated on motion of the creditor if the co-debtor was the party who actually received the consideration for the claim, if the debtor's plan proposes not to pay the claim, or if the creditor's interest would be irreparably harmed by continuing the stay. § 1301(c), Bankruptcy Code.

This chapter 13 case was filed on April 26, 2000. Tidewater was not listed as a creditor and has not filed a proof of claim. The debtor's initial plan was not confirmed, and the debtor filed a modified plan on August 15, 2000. That plan, which was confirmed on November 14, 2000, provides for a 100 percent dividend on unsecured claims.¹ Tidewater's motion represents that it is the holder of a claim against the debtor and Jacqueline Daniel² arising from the purchase of bedroom furniture on August 31, 1996, under the terms of a retail installment contract and security agreement. The original amount due under the contract was \$1,155.58, which was repayable with interest at 21 percent per annum in 12 monthly installments beginning September 31, 1996.

The motion does not state when and how Tidewater learned of the bankruptcy filing. The motion simply alleges that \$812.83 is due under the contract as of the filing date of the debtor's petition and that the confirmed plan "does not pay Tidewater the full amount of Tidewater's claim." In reviewing the motion, the court was initially concerned that the

¹ The standard form of plan in this district is a "pot plan" rather than a "percentage plan," with the result that the payment specified in the plan on unsecured claims is simply an estimate, and the actual payment could be either higher or lower (but obviously not higher than 100 percent), depending on the amount of claims ultimately filed and allowed. In this case, however, the most recent report filed by the trustee reflects that he is paying the unsecured claims at 100 percent.

² Jacqueline Daniel is apparently the debtor's wife (or former wife).

stated predicate for granting relief from the co-debtor stay was simply not true. The plan, at least on its face, does *not* fail to pay Tidewater the full amount of its claim, but rather provides for 100 percent payment on allowed unsecured claims. In fact, the only immediate reason Tidewater is not being paid the full amount of its claim is because it has not filed a proof of claim.

There is, however, an underlying practical truth to the allegation that the plan will not pay Tidewater the full amount of its claim. As noted, Tidewater was not listed as a creditor in the debtor's case, and there is no evidence that it had actual knowledge of the case in time to have filed a proof of claim by the claim bar date of August 22, 2000. Chapter 13, unlike chapter 7 and chapter 11, contains no provision for the payment of late-filed claims, even if the creditor was not listed on the schedules and had no actual knowledge of the case prior to the claims bar date. Rather, most courts have held that such claims are simply not "provided for" by the plan and survive the bankruptcy. Because Tidewater was not listed as a creditor in time to have filed a timely proof of claim in this case, the plan does not provide for or pay Tidewater's claim, and the necessary predicate for relief under § 1301(c)(2) therefore exists.

Even if the court were incorrect in that conclusion, the co-debtor stay has already terminated by operation of law. Under § 1301(d), Bankruptcy Code, the co-debtor stay "is terminated" twenty days after filing a motion for relief based on failure of the plan to pay the claim unless the debtor or any person liable on the debt files and serves a written objection. Although for practical reasons creditors usually seek formal entry of an order even where no timely objection is filed, an order is not essential, since the statute itself declares the stay terminated.

ORDER

For the foregoing reasons, it is

ORDERED:

1. The co-debtor stay under 11 U.S.C. § 1301(a) has been terminated with respect to the enforcement by Tidewater Finance Company of claims it may have against Jacqueline M. Daniels arising under the Retail Installment Contract and Security Agreement dated August 31, 1996.

2. The clerk will mail a copy of this memorandum opinion and order to the parties listed below.

Date: September 6, 2002

Alexandria, Virginia

/s/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

Copies to:

James R. Sheeran, Esquire
Tidewater Finance Company
P.O. Box 13306
Chesapeake, VA 23325-3306
Counsel for Tidewater Finance Co.

Timothy C. Daniels
P. O. Box 1588
Sterling, VA 20167
Debtor

Jacqueline M. Daniels
10 Lyndhurst Court
Sterling, VA 20165
Non-filing co-debtor

Richard G. Hall, Esquire
4208 Evergreen Lane, Suite 234
Annandale, VA 22003
Counsel for the debtor

Gerald M. O'Donnell, Esquire
201 North Union St., Suite 120
Alexandria, VA 22314
Chapter 13 trustee