

FILED

Samuel L. Kay, Clerk
United States Bankruptcy Court
Augusta, Georgia
By jpayton at 4:00 pm, Jul 09, 2009

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>09-10520</u>
Wayne Robert Sanders)	
)	
Debtor)	
_____)	
Georgia Bank & Trust Company of)	
Augusta)	
)	
Movant)	
)	
v.)	
)	
Wayne Robert Sanders)	
)	
Respondent)	
_____)	

ORDER

Before the Court is a motion for relief from stay filed by Georgia Bank & Trust Company of Augusta ("GB&T"). The Court has jurisdiction pursuant to 28 U.S.C. §1334 and this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(G). For the following reasons, the motion for relief is granted.

FINDINGS OF FACT

Wayne Robert Sanders ("Debtor") filed a chapter 7 bankruptcy petition on February 27, 2009. On Schedule F, Debtor lists the debt owed to GB&T on a promissory with the notation, "mother's car is collateral." (Dckt. No. 1.) Schedule B does not

list any motor vehicles as personal property of Debtor. (Dckt. No. 1.) The §341 meeting of creditors was held on March 25, 2009. On May 21, 2009, GB&T filed its motion for relief from stay. The motion reflects that on June 13, 2007, Debtor executed a promissory note in favor of GB&T in the amount of \$7,708.00. (Promissory note attached to motion, Dckt. No. 21.) A 2001 Oldsmobile Aurora ("vehicle") was pledged as collateral to secure the loan. (Certificate of Title attached to motion, Dckt. No. 21.)

At the June 11, 2009 hearing, Debtor testified legal title to the vehicle is in his mother's name, however, he drives the vehicle every day to school and pays for the insurance, gas and maintenance on the vehicle. Debtor's mother testified she currently is making the loan payments to GB&T and there is another car Debtor could drive to school if the vehicle is no longer available. Debtor testified he is current on all payments to GB&T.

Debtor did not file a statement of intention with respect to the debt owed to GB&T and Debtor refuses to sign a reaffirmation agreement with GB&T.

CONCLUSIONS OF LAW

The issue before the Court is whether relief from the stay should be granted where a chapter 7 debtor has not filed a statement of intention as to the debt owed to the creditor, and where the debtor has not agreed to reaffirm, redeem or surrender the personal

property. Section 521(a)(2) of the Bankruptcy Code states:

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate--

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h).

11 U.S.C. §521(a)(2). Section 362(h)(1) states:

In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)-

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

11 U.S.C. §362(h)(1)(A) and (B) (emphasis added).

Under sections 521 and 362(h), Debtor must file a statement of intention and must perform his intention or the automatic stay is terminated.¹ In the current case, Debtor did not file a statement of intention as to the debt owed to GB&T and he refuses to enter into a reaffirmation agreement with GB&T.

¹ At the hearing neither party addressed 11 U.S.C. §521(a)(6) and GB&T has not filed a proof of claim and therefore, does not appear to have an allowed claim for the purchase price of the vehicle. See generally In re Donald, 343 B.R. 524, 536 (Bankr. E.D.N.C. 2006) (stating the word "allowed" cannot be ignored and the filing a proof of claim is a prerequisite to receiving relief under §521(a)(6)); In re Anderson, 348 B.R. 652, 657 (Bankr. D. Del. 2006) (Congress used word "allowed claim" not just "claim"); In re Hinson, 352 B.R. 652, 657 (Bankr. E.D.N.C. 2006) (section applies only where creditor has an allowed claim for the purchase price).

Furthermore, the time limitations set forth in §521(a)(2) have passed. Debtor is attempting to hold onto the vehicle that secures his loan without taking any action on the obligation. The Eleventh Circuit has previously foreclosed such conduct stating:

Allowing a debtor to retain property without reaffirming or redeeming gives the debtor not a "fresh start" but a "head start" since the debtor effectively converts his secured obligation from recourse to nonrecourse with no downside risk for failing to maintain or insure the lender's collateral.

Section 521 mandates that a debtor who intends to retain secured property must specify an intention to redeem or reaffirm. Nothing in the plain language of the statute provides a debtor with an option to retain the property and to continue to make payments.

In re Taylor, 3 F.3d 1512, 1516 (11th Cir. 1993). This holding is reinforced by the 2005 amendments to the Bankruptcy Code. See In re Jones, 397 B.R. 775,787 (S.D. W. Va. 2008); In re Parker, 363 B.R. 621, 625 (Bankr. M.D. Fla. 2007) (stating debtor must elect to surrender, redeem, or reaffirm and do it timely). Interpreting the 2005 amendments to §521 and §362, the court in Jones stated:

The statute explicitly requires that a failure to redeem or reaffirm within the applicable time period terminates the automatic stay with respect to personal property of the estate or the debtor and the property will no longer be a part of the estate. Thus, while §521(a)(2)(A) and (B) do not generally alter a debtor's or trustee's rights with regard to personal property that serves as collateral, §362(h)(1)(A) provides for an exception in which, under certain circumstances, the stay

is terminated.'

Jones, 397 B.R. at 786 (internal citations omitted). In this case, Debtor has not filed his statement of intention and has refused to reaffirm the debt with GB&T and the applicable time period has expired. Because Debtor failed to perform his duties under 11 U.S.C. §521(a)(2) the automatic stay is terminated and relief is granted.² Parker, 363 B.R. at 625 (debtor has burden to prove he has performed his duties under §521).

It is therefore ORDERED GB&T's Motion for Relief from Stay is GRANTED as to the 2001 Oldsmobile Aurora, VIN#1G3GR62H514103614.



SUSAN D. BARRETT
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 9th Day of July 2009.

² There was some discussion at the hearing as to whether the car was even property of the estate. Debtor did not list the car on his schedules but testified to daily usage and payment of insurance and other maintenance costs. If the car is not property of the estate, the automatic stay does not protect it. See generally Hohenberg Bros. Co. v. Anderson Logistics Serv. Corp., 6 F. Supp. 2d 1377, 1380 (S.D. Ga. 1998) (cotton involved in case was not property of the estate and therefore case was not subject to the automatic stay); In re Everchanged, Inc., 230 B.R. 891, 893 (Bankr. S.D. Ga. 1999) (stating if property is not "property of the estate" then the automatic stay does not prevent action by a creditor against the property).