

11 USC §362 (d)  
11 USC §1301(c)  
11 USC §1327

In re Hemphill

Case No. 390-36757-H13 USDC Civ. No. 91-902-Fr 9-30-91  
Affirming Bankruptcy Court (HLH)

The US District Court affirmed the bankruptcy court's oral ruling that a judgment creditor was not entitled to relief from the co-debtor stay or from the automatic stay. The District Court stated that the creditor's failure to object to the provisions of the chapter 13 plan bound the creditor and rendered the appeal moot.

Even if the creditor were not so bound, the court affirmed the bankruptcy court's ruling on the minimal record produced at the hearing that the co-debtor stay was applicable since the debt was for a consumer transaction.

Finally, the District Court affirmed the lower court's ruling that the creditor was not entitled to relief from the automatic stay because the plan proposed to pay all creditors in full. There was no evidence that the creditor lacked adequate protection or even that the creditor was held a perfected security interest in any property.

P91-23(9)

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CLERK U.S. DISTRICT COURT  
DISTRICT OF OREGON

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*epn* *10/2/91*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In re	)	
OLIVER HEMPHILL,	)	Case No. 390-36757-H13
	)	Civil No. 91-902-FR
Debtor.	)	
_____	)	O R D E R

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FRYE, Judge:

The matter before the court is the appeal of David H. Regan, M.D. from an order of the United States Bankruptcy Court denying his motion for relief from stay.

BACKGROUND

The debtor in this bankruptcy proceeding is Oliver

1 Hemphill. Hemphill is the sole shareholder of Taralara  
2 Holdings, Ltd. (Taralara).

3 On or about June 19, 1986, the appellant in this appeal,  
4 Dr. Regan, entered into a Lease Purchase Agreement to lease,  
5 and eventually to sell, a ranch to Taralara. The ranch con-  
6 sists of twenty acres of land. Taralara agreed to pay Dr.  
7 Regan over \$49,000 for the option to purchase the ranch under  
8 the Lease Purchase Agreement. The selling price of the ranch  
9 was \$549,000.

10 On or about February 28, 1987, Dr. Regan and Taralara  
11 entered into a contract for the sale of the personal property  
12 associated with the ranch, in which Taralara agreed to pay to  
13 Dr. Regan \$27,800.

14 In May of 1987, Taralara was involuntarily dissolved.  
15 The payments required to be made to Dr. Regan by Taralara  
16 under the Lease Purchase Agreement and the contract for the  
17 sale of the personal property were not made.

18 On November 20, 1989, Dr. Regan filed a petition in  
19 bankruptcy under Chapter 11.

20 On September 10, 1990, Dr. Regan obtained a judgment  
21 from the United States Bankruptcy Court against Taralara,  
22 Oliver Hemphill and Evelyn Hemphill, the former wife of Oliver  
23 Hemphill, on the contract for the sale of personal property  
24 associated with the ranch and the fair rental value of the  
25 ranch. The judgment provides, in part, as follows:

26 1. Plaintiff is awarded judgment against  
Defendants on his First Claim for Relief as follows:

1 Defendants, and each of them, are ordered to  
2 immediately turn over to the Debtor in possession  
3 [Dr. Regan] all of the personal property which is  
4 the subject of Plaintiff's First Claim for Relief;  
5 In the event that the Defendants, or any of them,  
6 desire to purchase all of the personal property  
7 which is the subject of Plaintiff's First Claim  
8 for Relief, Defendants, and each of them, are  
9 ordered to pay Plaintiff \$27,500, plus statutory  
10 post judgment interest, from April 30, 1987 until  
11 paid.

12 . . . .

13 5. With respect to Plaintiff's Fifth Claim  
14 for Relief, awarding Plaintiff judgment against  
15 Defendants in the amount of \$38,500 (representing  
16 the reasonable value of the use of the real property  
17 which is the subject of Plaintiff's Fifth Claim for  
18 Relief from July 1, 1989 until Plaintiff's interest  
19 in the said property was foreclosed), together with  
20 prejudgment interest at the rate of nine percent  
21 (9%), per annum, in the amount of \$2,876.11, with  
22 postjudgment interest accruing at the statutory  
23 rate.

24 The judgment was docketed in the Circuit Court of the  
25 State of Oregon for the County of Clackamas on October 5, 1990  
26 and now represents a debt owing to Dr. Regan of over \$90,000,  
with accrued statutory interest.

On December 13, 1990, Hemphill filed a petition in bank-  
ruptcy under Chapter 13.

On February 21, 1991, Dr. Regan filed a notice of motion  
for relief from the automatic stay pursuant to 11 U.S.C. §  
1301(c) to permit him to pursue his rights to the ranch. In  
his motion for relief from the automatic stay, Dr. Regan con-  
tended that Hemphill had listed in his Chapter 13 statement  
the sum of \$40,000 as the amount of the debt owed to Dr.  
Regan. Dr. Regan further asserted that the Clackamas County

1 Circuit Court judgment of September 10, 1990 requires Hemphill  
2 to pay \$27,500 or to return the personal property and the sum  
3 of \$38,500, plus interest. Because this sum represents consi-  
4 derably more than the \$40,000 indebtedness listed by Hemphill,  
5 Dr. Regan argued that he is entitled to relief from the auto-  
6 matic stay pursuant to 11 U.S.C. § 1301(c).

7 On March 19, 1991, the bankruptcy court held a hearing  
8 to address Dr. Regan's motion to lift the automatic stay.  
9 Hemphill argued against the motion to lift the automatic stay  
10 because he is purchasing the equipment represented by the  
11 \$27,500 judgment under the plan as allowed by the judgment  
12 of September 10, 1990. Hemphill argued that the interest of  
13 Dr. Regan in the judgment is protected by the bankruptcy plan,  
14 and no action on the property can be taken against him or his  
15 co-debtor, Evelyn Hemphill.

16 Dr. Regan argued at the hearing to address his motion  
17 to lift the automatic stay that the judgment of September 10,  
18 1990 required Hemphill to turn over or to pay for the property  
19 at issue immediately. Since Hemphill did not turn over the  
20 property or pay Dr. Regan, Dr. Regan argued that the automatic  
21 stay should be lifted so that he could immediately execute on  
22 the property.

23 The bankruptcy court concluded that the judgment of  
24 September 10, 1990 allowed Hemphill to exercise the right to  
25 pay money for the personal property, and that adequate provi-  
26 sion for payment had been made in the Chapter 13 plan. As a

1 result, the bankruptcy court concluded that Hemphill is pur-  
2 chasing the equipment under the plan as allowed by the judg-  
3 ment, and the interest of Dr. Regan is adequately protected.  
4 The bankruptcy court allowed Dr. Regan no relief from the  
5 stay. As to the \$38,500 judgment on the fifth claim for  
6 relief for the reasonable value for the use of the property,  
7 the bankruptcy court found that the Chapter 13 plan contem-  
8 plates full payment of the debt to Dr. Regan which would be  
9 fixed by the proof of claim that was actually filed. The  
10 bankruptcy court concluded that there were no grounds upon  
11 which relief from the automatic stay would be granted.

#### 12 CONTENTIONS OF THE PARTIES

13 Dr. Regan contends that 1) the bankruptcy court erred  
14 in denying his motion to lift the automatic stay under sec-  
15 tion 1301 because the debt was a business debt, rather than  
16 a consumer debt, and therefore Dr. Regan was entitled to  
17 pursue the obligation against the co-debtor, Evelyn Hemphill;  
18 2) the bankruptcy court erred in denying his motion to lift  
19 the automatic stay under section 362(d)(1) because he was in  
20 the position of a secured creditor without adequate protection  
21 under the bankruptcy plan; and 3) the bankruptcy court erred  
22 in denying his motion to lift the automatic stay under section  
23 362(d)(2) because Hemphill had no equity in the property, and

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1 the property was not necessary for an effective reorganiza-  
2 tion.<sup>1</sup>

3 Hemphill contends that 1) the bankruptcy court properly  
4 concluded that the personal property at issue was for per-  
5 sonal, family or household use, so that the statutory pro-  
6 visions for maintenance of the section 1301 co-debtor stay  
7 were satisfied; 2) Dr. Regan is not entitled to adequate pro-  
8 tection because he is not a secured creditor; and 3) it was  
9 proper for the bankruptcy court to conclude that personal  
10 property used to maintain the residence of Hemphill and the  
11 animals located on the property is necessary for an effective  
12 reorganization. In any event, Hemphill asserts that the  
13 Chapter 13 plan has been confirmed, and that Dr. Regan has  
14 not objected to that confirmation nor raised the issue of  
15 confirmation on appeal, thereby rendering this appeal moot.

#### 16 APPLICABLE LAW

17 In reviewing a decision of a bankruptcy court, a district  
18 court acts as an appellate tribunal and is governed by tradi-  
19 tional standards of appellate review. Factual findings are  
20 reviewed under the clearly erroneous standard, and conclusions  
21 of law are reviewed de novo. Ragsdale v. Haller, 780 F.2d  
22 794, 795 (9th Cir. 1986).

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24 <sup>1</sup> In his motion for relief from automatic stay, Dr.  
25 Regan relies only upon section 1301(c) as a grounds for  
26 relief, but does ask the court to grant such other relief  
as is just.

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## ANALYSIS

11 U.S.C. § 1327 states the effect of confirmation as follows:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

The confirmed Chapter 13 plan of Hemphill provides for 100% payment to Dr. Regan as an unsecured creditor in paragraph 2(d) and makes no other provisions regarding the property of the estate. Dr. Regan did not object to the plan and does not appeal the confirmation of the plan. Hemphill convincingly argues that, pursuant to section 1327, the confirmed plan binds Dr. Regan, and therefore Dr. Regan has no right to relief from the stay at this stage in the proceedings, rendering this appeal moot.

Even if this appeal were not to be considered moot, this court concludes that the bankruptcy court properly denied Dr. Regan's motion for relief from the stay based upon the record before the court for the following reasons:

1. 11 U.S.C. § 1301 provides that the stay of an action



1 against a co-debtor does not apply if the debt is a business  
2 or non-consumer debt. Dr. Regan asserted at the bankruptcy  
3 hearing that he should be allowed to pursue legal remedies  
4 against the co-debtor, Evelyn Hemphill, under section 1301  
5 on the grounds that the obligation was not a consumer debt.  
6 There was little or no evidence presented at the hearing as  
7 to this issue. Counsel for Hemphill respresented to the bank-  
8 ruptcy court that the ranch was a "hobby farm." Counsel for  
9 Dr. Regan represented to the bankruptcy court that it was not  
10 a "hobby farm" because Hemphill files a schedule F with the  
11 Internal Revenue Service.

12 Despite this dispute, it is undisputed that Hemphill  
13 resides at the residence, and the bankruptcy court could pro-  
14 perly conclude from the slim record before it that the obli-  
15 gation was a consumer debt and that relief from the stay was  
16 not proper under section 1301.

17 2. Dr. Regan asserts a right to relief from the stay  
18 pursuant to 11 U.S.C. § 362(d)(1) on the grounds that he has  
19 a secured claim on the portion of the judgment based on the  
20 contract for sale of personal property, and he is without ade-  
21 quate protection as to that secured claim.


22 There is no evidence in this record that the contract for  
23 sale of personal property created a security interest in the  
24 personal property. Furthermore, there is no evidence in this  
25 record that the Chapter 13 plan providing for 100% payment is  
26 not an adequate form of protection in this case.

1 3. Finally, Dr. Regan contends that he is entitled to  
2 relief from the stay under 11 U.S.C. § 362(d)(2) because he  
3 has proven (a) his debt; (b) the perfection of his security  
4 interest; and (c) the value of the collateral. The bankruptcy  
5 court concluded that Dr. Regan did not prove to it that he  
6 had a security interest in the personal property. This court  
7 finds that the bankruptcy court did not err in concluding that  
8 relief from the stay under section 362(d)(2) was not proper.

9 **CONCLUSION**

10 The appeal from the order of the bankruptcy court denying  
11 Dr. Regan's motion for relief from the stay in the bankruptcy  
12 proceeding is dismissed.

13 DATED this 30 day of September, 1991.

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15 HELEN J. FRYE  
16 United States District Judge  
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