

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

JAMES WALDRON,
SHERYL WALDRON,
Engaged in farming,

Case No. 85-1779-W

Chapter 13

Debtors.

ORDER ON MOTION

On December 1, 1986, the motion for relief from stay filed on behalf of the Farmers and Merchants Bank of Elmo, Missouri (hereinafter referred to as the Bank) on September 29, 1986 came on for hearing before this court in Council Bluffs, Iowa. James N. Millhone appeared on behalf of the Bank. Charles-M. Meyer appeared for the first time in this matter on behalf of the debtors. Joe Warford, the Chapter 13 trustee, was also present.

In the motion filed September 29, 1986, the Bank seeks relief from the automatic stay as to Gerald Mattes, a codebtor on a promissory note for \$300,000 executed by the debtors and Mr. Mattes on or about February 12, 1982. The Bank contends that the money borrowed was a business loan, not a consumer debt as defined by 11 U.S.C. § 101(7) and as contemplated by the codebtor stay provisions of 11 U.S.C. § 1301(a). The Bank further argues that even if the indebtedness were construed as a consumer debt, it would be

entitled to relief under 11 U.S.C. 1301(c)(2) because the plan proposed by the debtors does not propose to pay the remaining unsecured claim. (The confirmed plan as modified provided for the surrender to the Bank of the collateral securing the loan and for no payment to unsecured creditors.)

The Bank also pointed out in the motion and at the time of the hearing that the debtors had not filed and served upon the Bank a written objection to the motion as required by 11 U.S.C. § 1301(d). Likewise, although the November 19, 1986 notice of hearing directed that written resistances be filed by November 26, 1986 to be considered at the time of the hearing, the debtors failed to file any written objection by the time of the hearing on December 1, 1986. Parenthetically, the court file reflects that both the debtors and Mr. Meyer received notice of the hearing.

Mr. Meyer, who appeared at the hearing on behalf of the pro se debtors, argued that the confirmed plan as modified was res judicata as to the issue before this court. Although Mr. Meyer did not have ready case law to cite at the time of the hearing, he believed he had read some case law that would support his argument. Accordingly, the parties were given three weeks to brief the matter.

The Bank filed its brief in support of the motion for relief from stay on December 15, 1986; debtors have not filed a brief to date.

The stay of an action against a codebtor in a Chapter 13 case applies only to consumer debt, not to business debt.

11 U.S.C. § 1301(a). Hence, the threshold issue is whether the indebtedness in question is a consumer debt. A consumer debt is defined at 11 U.S.C. § 101 (7) as a debt "incurred by an individual primarily for a personal, family, or household purpose". In paragraph 11b of the debtors' Chapter 13 statement filed August 26, 1985 and on amended Schedule A-2 filed October 10, 1985, the debtors portray their debt with the Bank as a loan for business inventory. The debtors have failed to argue that the indebtedness was really for a consumer loan or to present any evidence contrary to their admission in the statement and schedule. (Likewise, the proof of claim filed by the Bank on October 11, 1985 evidences a business loan.) Mr. Meyer has failed to develop the res judicata argument so as to explain how such theory would otherwise satisfy the threshold issue.

In light of the above conclusive analysis, the court need not determine whether the Bank was entitled to relief pursuant to 11 U.S.C. §§ 1301(c) (2) and 1301 (d).

It should be noted that the issue raised by Mr. Meyer at the time of the hearing was taken under advisement due to what appeared at the time to be technically a pro se situation. This case should not be relied upon by any party or attorney in the future as precedent for arguing a resistance that has not been previously presented in written form in accordance with an order for hearing and notice requiring such a written resistance.

WHEREFORE, it is hereby found that the indebtedness

owed the Bank is not a consumer debt and that, in accordance with 11 U.S.C. § 1301 (a), the automatic stay found in 11 U.S.C. § 362 does not apply to the Bank's actions against the codebtor.

THEREFORE, the relief sought by the Bank in its motion for relief from stay filed on September 29, 1986 is granted.

Signed and filed this 31st day of December, 1986.

LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE