

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

RANDALL E. BRATT  
JACQUELINE A. BRATT

CASE NO. 00-64173

Debtors

Chapter 13

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court are two motions involving the same parties. The initial motion was filed on May 4, 2001, by Key Bank USA, N.A. ("Key Bank") seeking relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") in order to repossess a 1999 Itasca Recreational Vehicle ("RV" or "Collateral"). Key Bank also requested abandonment of any interest the chapter 13 trustee might have in the RV pursuant to

Code § 554. Limited opposition to Key Bank's motion was filed by Randall E. and Jacqueline A. Bratt ("Debtors"). The Debtors did not oppose the lifting of the automatic stay in order for Key Bank to repossess the RV. The Debtors did object "to anything other than the filing of an unsecured claim for any outstanding balance not recovered from the sale of the Collateral."

The motion was heard by the Court on June 26, 2001, in Syracuse, New York, and adjourned to July 24, 2001, in order for the Court to have an opportunity to review the cases cited by both parties on oral argument concerning the treatment of any deficiency claim.<sup>1</sup> At the hearing on July 24, 2001, the Court agreed to take the matter under submission and allowed the parties an opportunity to file memoranda of law.<sup>2</sup> The matter was submitted for decision on August 24, 2001.

On September 13, 2001, while the prior matter was pending, the Debtors filed a motion to modify their chapter 13 plan.<sup>3</sup> Debtors propose to abandon the RV. On September 24, 2001, Key Bank filed limited opposition to the motion, asserting that it had no objection to the abandonment of the Collateral, provided that the issue of the resulting deficiency remain for decision by the Court.

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<sup>1</sup> Pursuant to Code § 362(e), the Court finds that the 30 day period set forth therein is inapplicable by virtue of the consensual adjournments of the motion and the Court's need to consider the ancillary issue posed by the treatment of the deficiency claim.

<sup>2</sup> This Court orally granted the request of Michelle C. Marans, Esq. to submit an *amicus curiae* memorandum at the July 24<sup>th</sup> hearing. Ms. Marans takes the position that any outstanding balance resulting from the surrender of collateral postpetition should be treated as unsecured debt.

<sup>3</sup> Previously, on January 9, 2001, the Debtors had filed a motion seeking to modify the Plan. Among their proposals was a request to abandon the RV. The motion was filed as a default motion, scheduled for hearing on January 23, 2001. No opposition to the motion was filed. However, Debtors' counsel failed to submit an order granting the relief. The motion was subsequently marked as abandoned on the Court's docket on April 27, 2001.

The Court heard oral argument on the Debtors' motion on October 16, 2001, and the matter was submitted for decision, as well.

### **JURISDICTIONAL STATEMENT**

The Court has jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (G) and (O).

### **FACTS**

The Debtors filed a voluntary petition ("Petition") pursuant to chapter 13 of the Code on August 23, 2000. On Schedule B, filed with the Petition, the Debtors list the RV as personal property with a value of \$42,400. There is also a notation by the Debtors that the RV is leased by them for income purposes. Key Bank is listed as a creditor with a secured claim of \$42,400, the alleged value of the RV. On October 2, 2000, Key Bank filed a proof of claim in the amount of \$40,535.16 in connection with the debt secured by the RV. According to Schedule G, the Debtors have an agreement with Four Seasons' Rental, whereby Four Seasons receives a 30% commission for the storage, maintenance and rental to third parties of the RV.<sup>4</sup> Schedule I lists

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<sup>4</sup> Attached to Key Bank's motion and limited response to Debtors' motion is a copy of the Consumer Note, Installment Loan, Note, Security Agreement and Disclosure Statement, dated December 24, 1999. One of the terms of the Agreement provides that "You [borrower] promise that until this Agreement is paid in full, you will not transfer ownership of any interest in the Collateral by sale, lease, charter or give the collateral to anyone else without our [Key Bank's] written permission."

rental income from the RV of \$800 per month. The Plan provides for monthly payments to Key Bank of \$595.18 per month, to be paid directly by the Debtors outside of the Plan. It also provides for a 12% dividend to be paid to unsecured creditors. On January 10, 2001, the Court signed the Order confirming the Debtors' chapter 13 Plan. According to Key Bank, the Debtors have not complied with the terms of the Plan in that the Debtors have not made any payments to Key Bank since January 2001.

### DISCUSSION

Code § 1327(a) provides that “the provisions of a confirmed plan bind the debtor and each creditor . . . .” 11 U.S.C. § 1327(a). The confirmed plan governs the property and contract rights between the debtor and its creditors. *See In re Elmore*, 94 B.R. 670, 678 (Bankr. C.D. Cal. 1988). The failure to comply with the terms of the Plan, as confirmed by Order of this Court on January 10, 2001, may be cause for relief from the automatic stay pursuant to Code § 362(d)(1). *See id.*

According to Key Bank, the Debtors have failed to make any of the regular monthly payments of \$595.18 as provided for in the Plan since January 2001. The Debtors do not dispute this and, in fact, in their response to the motion did not object to the lifting of the automatic stay in order for Key Bank to repossess the RV.

At the hearings on both Key Bank's motion seeking relief from the automatic stay and the Debtors' motion for modification of their Plan, including abandonment of the RV, the Court was presented with the issue of determining the appropriate treatment of the deficiency claim that the parties anticipate will arise upon sale of the RV. Having had an opportunity to review all of the

pleadings and facts in this case, the Court concludes that the Debtors' argument in connection with Key Bank's motion for relief from the automatic stay was unresponsive and inappropriate under the circumstances. In considering Key Bank's motion, the Court need focus only on whether it has met its burden and whether it is entitled to the relief sought pursuant to Code § 362(d). In asking that the Court consider the nature of any possible deficiency claim upon sale of the Collateral, the Debtors are asking that the Court render an advisory opinion. Indeed, at the hearing held on October 16, 2001, Debtors' counsel cavalierly indicated that the Debtors might wish to withdraw their request to abandon the RV should the Court determine that Key Bank holds a claim for any deficiency, whether unsecured, priority or secured.<sup>5</sup>

The Court is without authority to render an advisory opinion on a potential controversy. *See Matter of FedPak Systems, Inc.*, 80 F.3d 207, 211-12 (7th Cir. 1996) (indicating that "A bankruptcy court, like any other federal court, lacks the constitutional power to render advisory opinions or to decide abstract, academic or hypothetical questions."). The RV has not been sold and while the parties anticipate there being a deficiency, none exists at this time. Accordingly, at this stage of the case, the Court holds that Key Bank's motion seeking relief from the automatic stay is granted for cause based on the Debtors' failure to comply with the terms of the Plan, requiring that they make monthly payments directly to Key Bank, and based on the lack of any substantive opposition to the motion by the Debtors. Once the RV has been sold, the parties may

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<sup>5</sup> According to the Supplemental Opposition to the Debtors' Motion submitted on behalf of Key Bank and filed with the Court on October 11, 2001, it is alleged that "when the employees of Key Bank contacted the Debtors' concerning the return of the Collateral, Debtors advised Key Bank that the Collateral was being leased by the Debtors at the rate of \$800.00 per week and Debtors did not want to relinquish control of the Collateral while there was still pending rental income."

return to the Court for it to consider any arguments pursuant to Code § 502(j) they may wish to make in regard to reconsideration of Key Bank's allowed secured claim. *See, e.g., In re Johnson*, 247 B.R. 904 (Bankr. S.D.Ga. 1999).

Based on the foregoing, it is hereby

ORDERED that Key Bank's motion seeking relief from the automatic stay in order to repossess the RV is granted pursuant to Code § 362(d)(1); it is further

ORDERED that to the extent that the chapter 13 trustee has acquired any interest in the RV, there being no opposition filed by the chapter 13 trustee, Key Bank's motion seeking abandonment by the trustee pursuant to Code § 554 is granted; and it is finally

ORDERED that Debtors' motion seeking to modify their chapter 13 plan shall be returned to the Court's calendar on January 22, 2002, in Syracuse, New York, for further consideration.

Dated at Utica, New York

this 27th day of December 2001

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STEPHEN D.GERLING  
Chief U.S. Bankruptcy Judge