

#2526

signed 6-2-00

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**DEBRA LOUISE DOUGLAS,
DEBTOR.**

**CASE NO. 99-42416-13
CHAPTER 13**

**ORDER DENYING DEBTOR'S APPLICATION FOR A CONTEMPT CITATION
AGAINST CAPITAL CITY PAWN SHOP, INC., DETERMINING CERTAIN PROPERTY
IS NOT PROPERTY OF THE ESTATE BUT CERTAIN OTHER PROPERTY IS
PROPERTY OF THE ESTATE, AND ORDERING TURN OVER OF THE PROPERTY OF
THE ESTATE PURSUANT TO 11 U.S.C.A. §542(a)**

This matter is before the Court on the debtor's application for citation in contempt. The debtor appears by counsel Michael F. Brunton. Creditor Capital City Pawn Shop, Inc. ("Capital City"), appears by counsel Kyle J. Mead of Sloan, Listrom, Eisenbarth, Sloan & Glassman, L.L.C. The Court has reviewed the relevant materials and is now ready to rule.

FACTS

The debtor pawned various items at Capital City during the months of March, May, and September of 1999, and then filed a chapter 13 bankruptcy petition on October 25, 1999. She listed Capital City as a creditor, and it was notified of the bankruptcy filing. In November, the debtor amended her chapter 13 plan to treat Capital City as a secured creditor that would be paid for the pawned items. Later, she amended her schedule of exemptions to claim most of the pawned property as exempt. Claiming to be secured, Capital City filed a proof of claim in December, and then amended it in January to increase the amount. Capital City did not object to the debtor's plan, and it was orally confirmed on March 1, 2000. A written confirmation order was entered on March 9.

In December 1999, the debtor asked the Court to order Capital City to appear and show cause why it should not be held in contempt for failing to turn property of her bankruptcy estate over to her despite her requests. Although she did not expressly say so in her pleading, the debtor was contending that all the property she had pawned to Capital City was property of the estate. In response, Capital City alleged that it was not obliged to turn over the property because it had become the owner of some of the property prepetition, and the debtor had only a redemption right in the rest of it that had expired sixty days after she filed for bankruptcy.

DISCUSSION

Capital City relies on K.S.A. 16-714 and 11 U.S.C.A. §108(b) to support its position.

K.S.A. 16-714 provides:

Every loan made by a pawnbroker for which goods are received in pledge as security shall be evidenced by a written contract, in ink, a copy of which shall be furnished to the borrower. The loan contract shall set forth the loan period, which shall be one (1) month, the date on which the loan is due and payable and the charges, and it shall clearly inform the borrower of his right to redeem the pledge during the redemption period of two (2) months after due date. Except as otherwise provided herein, the holder of any such contract shall be presumed to be the person entitled to redeem the pledge, and the pawnbroker shall deliver the pledge to the person presenting the contract, upon payment of the principal and charges.

Every pawnbroker shall retain in his possession, after the date on which the loan became due and payable, every article pledged to him for a redemption period of two (2) months. During such period, the borrower may redeem the pledged articles, upon payment of the principal and charges. It shall be unlawful for any pawnbroker to sell or transfer title or possession of any pledged property until the expiration of such period of redemption.

If any pledged article is not redeemed within such redemption period, the pawnbroker shall become vested with all right, title and interest of the pledgor, or his assigns, to such pledged article, to hold and dispose of as his own property. Any other provision of law relating to the foreclosure and sale of pledges shall not be applicable to any pledge, the title to which is transferred in accordance with this section.

Section 108(b) of the Bankruptcy Code provides in pertinent part:

[I]f applicable nonbankruptcy law . . . fixes a period within which the debtor . . . may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

These provisions, Capital City contends, established a brief window for the debtor to redeem her pawned property, either: (1) the two-month redemption period fixed by K.S.A. 16-714 if that period expired before the debtor filed for bankruptcy, or (2) the later of that two-month period or sixty days after the debtor filed for bankruptcy. Since the window closed for all the property the debtor had pawned without the debtor having exercised her right to redeem, it reasons, the property all became Capital City's. The debtor seems to concede the property she pawned in March and May now belongs to Capital City because her redemption period under 16-714 expired before she filed for bankruptcy. However, she argues that the property she pawned in September became property of her bankruptcy estate under 11 U.S.C.A. §541(a), and that §542(a) obliged Capital City to turn it over to her because she could exempt it under §522.

The Court agrees with the parties that the property the debtor pawned in March and May, more than three months before she filed for bankruptcy, became Capital City's property, pursuant to K.S.A. 16-714, when the debtor failed to redeem it within three months of the day she pawned it. Consequently, the property did not become property of the debtor's bankruptcy estate when she later filed for bankruptcy because she no longer owned or had any other interest in it.

The property the debtor pawned in September, however, must be separately analyzed. When she filed for bankruptcy, her one-month repayment period under 16-714 had expired, but her two-

month redemption period had not. Capital City received notice of the debtor's bankruptcy filing and of her amended plan that proposed treating it as a secured creditor that would retain its lien and be paid the value of the pawned property over time through the plan. Notice of the plan was sent and Capital City did not respond within the time allotted for objections. After the objection time ran, the debtor filed her application for Capital City to be cited in contempt for failing to turn the pawned property over to her. A few days later, Capital City filed a proof of claim asserting that it was a secured creditor. A few weeks later, it amended its claim to increase the amount owed to it, and again asserted that it was a secured creditor. A hearing on the debtor's application for contempt was scheduled for late January, but was continued by agreement of the parties. Another few weeks passed before Capital City's counsel "uncovered research and legal precedent which caused him to revise [Capital City's] position with respect to the subject property," and he advised the debtor's counsel of this change. Still, no objection to the plan was filed, and it was orally confirmed on March 1, 2000. By failing to object, Capital City waived the right to question its treatment under the plan and argue that the debtor had to redeem the pawned property from it within sixty days of filing for bankruptcy or lose the property. *See Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253, 1256-58 (10th Cir. 1999) (even if chapter 13 plan provision violated Bankruptcy Code, creditor that failed to object before confirmation could not later complain about the provision).

Even if Capital City had timely objected to the debtor's plan, the Court would not agree with its argument. On the day she filed for bankruptcy, the debtor remained the owner of the property she had pawned in September. K.S.A. 16-714 does not change the ownership of the property until the two-month redemption period has expired. Instead, it expressly prohibits the pawnbroker from selling or

transferring title or possession of the pawned property until the redemption period is over. Before that period ends, the pawnbroker holds the property only as security for the loan it made to the debtor. The Court believes that property thus held became property of the estate under 11 U.S.C.A. §541(a) and was covered by the turnover obligation imposed by §542(a) since the debtor exempted it under §522. The turnover obligation is limited only by the right to request adequate protection under §§362(e) and 361. The debtor may then propose: (1) under §1322(b)(2) to modify the pawnbroker's rights as a secured creditor; (2) to provide for curing her default as allowed by §1322(b)(3)—here, by paying the pawnbroker's claim; and (3) to pay the pawnbroker's claim over time under §1325(a)(5). The debtor's right to deal with a secured claim under these provisions applies in this situation because the debtor remained the owner of the pawned property, and these provisions specifically control the debtor's options for dealing with secured claims in a chapter 13 plan.

Section 108(b) does not change the Court's thinking in this case. While it specifies a time limit for, among other things, curing a default, the Court is convinced this generally applicable provision must give way to the more specific chapter 13 provisions cited above, to the extent it may be inconsistent with them. On the other hand, it might be more appropriate to harmonize the provisions by requiring a debtor to propose a chapter 13 plan providing for the cure of a default under these provisions within the time limit established in §108(b). In this case, within the time fixed by §108(b), the debtor did file her amended plan to treat Capital City as a secured creditor that would retain its lien and be paid the value of its collateral over time. The Court believes this action satisfied §108(b), assuming it applied at all, because the chapter 13 provisions created a method of redemption other than immediate full payment. The cases Capital City relies on are not persuasive to the Court because they considered only the

question whether §362(a) prevents the running of the time fixed by §108(b), not whether provisions in chapter 13 supersede it or establish a substitute method of redemption. *See Cash America Pawn, L.P., v. Murph*, 209 B.R. 419, 422-23 (E.D. Tex. 1997); *Dunlap v. Cash America Pawn*, 158 B.R. 724, 727-28 (M.D. Tenn. 1993); *In re Jackson*, 133 B.R. 541, 545-46 (Bankr. W.D. Okla. 1991).

Although the Court is ruling against Capital City with respect to the property pawned in September 1999, the Court believes the creditor had a reasonable basis for thinking it became the owner of all the pawned property when the §108(b) time passed without the debtor redeeming it by immediate full payment. The issue was one of first impression before this Court, and Capital City should not be punished with a contempt citation for raising it. Of course, Capital City also prevailed with respect to its claim to the property pawned in March and May 1999. Consequently, the debtor's application for a citation in contempt is denied.

In light of this decision, the parties should confer to make arrangements for the property pawned in September to be turned over to the debtor, subject to reasonable provisions for adequate protection. The debtor will have ten days to amend her plan to reflect the Court's ruling that she no longer owns the property she pawned in March and May.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this ____ day of June, 2000.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE