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signed 11-26-01

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

In re:

ANITA LOUISE YOUNG,

DEBTOR.

**CASE NO. 01-40910-7
CHAPTER 7**

**ORDER DENYING SANCTIONS AND ADEQUATE PROTECTION
FOR FAILURE TO COMPLY WITH 11 U.S.C.A. §521(2)(B)**

This matter is before the Court on the motion of CommunityAmerica Credit Union (CACU), a creditor, for (1) relief from stay, (2) sanctions, including attorney fees, against the debtor and her attorney, and (3) adequate protection, for her failure to comply with 11 U.S.C.A. §521(2)(B). CACU is represented by James S. Willard. The debtor is represented by Jill A. Michaux.

FACTS

1. The debtor filed a chapter 7 bankruptcy petition on April 10, 2001.
2. The petition was not accompanied by schedules.
3. At that time, the debtor owed CACU a debt secured by a 1997 Dodge Stratus. She was substantially in arrears on the debt.
4. After the bankruptcy petition was filed, Ms. Michaux orally notified Mr. Willard that the case had been filed and that her client would be surrendering CACU's collateral.
5. Mr. Willard presented a proposed agreed stay relief order to Ms. Michaux on April 25.

6. Ms. Michaux declined to sign the proposed order without the consent of her client prior to the expiration of the debtor's 45-day performance deadline under 11 U.S.C.A. §521(2)(B).
7. The debtor's schedules, including her statement of intention were filed on April 27.
8. The statement of intention indicated that the debtor intended to retain CACU's collateral and keep current on the original debt.
9. At the meeting of creditors held on May 7 pursuant to §341(a), the debtor told Mr. Willard that the statement of intention was wrong, and that she indeed intended to surrender the car to CACU.
10. On May 11, Mr. Willard asked the chapter 7 trustee to perform his duty under §704(3) to ensure that the debtor performed her intention as specified in §521(2)(B) (although he indicated that he doubted there was anything the trustee could do).
11. On June 6, the trustee advised Mr. Willard that he knew of nothing he could do to require the debtor to perform her duties under §521(2)(B), but agreed that CACU could file a stay relief motion.
12. When he received the trustee's letter, Mr. Willard filed CACU's motion for stay relief, sanctions, including attorney fees, and adequate protection. He first noticed the motion for hearing on June 28, but neglected to notice the debtor, so he renoticed it for hearing on July 11th.
13. The debtor filed a corrected statement of intention on June 21 that indicated she intended to surrender CACU's collateral.
14. The debtor filed a response to CACU's motion on June 25, opposing any allowance of attorney fees, adequate protection, or expenses. The response did not express any opposition to CACU's request for stay relief.
15. The Debtor surrendered the car to CACU on July 1.

16. A hearing on CACU's motion and the debtor's response was held on July 11. The Court ruled that CACU could submit an order modifying the stay to allow it to sell the car, but no such order appears in the court file as of the date of this order. The parties subsequently submitted briefs in support of their respective positions concerning sanctions and adequate protection.

DISCUSSION AND CONCLUSIONS

Section 521 provides in pertinent part:

The debtor shall—

...

(2) if an individual debtor's schedule of assets and liabilities includes consumer 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 . . . the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property . . . ; [and]

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph.

Because the debtor owed CACU a secured consumer debt, filed her chapter 7 petition on April 10, and sought no extensions of the deadlines set by this statute, the most time she could have had to file her statement of intention and then perform it would have been June 24. Her original statement of intent, filed on April 27, was submitted well within the thirty days allowed under §521(2)(A). Of course, it incorrectly said that she intended to keep CACU's collateral. The written amendment she filed on June 21 was submitted after the 30-day deadline set by §521(2)(A), without any request for an extension of the deadline. On May 7, though, within the time allowed, she orally amended her statement by telling Mr. Willard that the filed statement was wrong and she intended to surrender the car to CACU. The

45-day deadline set by §521(2)(B) should therefore be counted from May 7. *Cf. In re Gregg*, 199 B.R. 404, 406 (Bankr. W.D. Mo, 1996) (argument for new 45-day performance period starting when debtor changed intent plausible if change expressed within 30-day statement of intention period, but not if expressed later).

While Mr. Willard's April 25 request that Ms. Michaux sign an agreed order for stay relief was not improper, Ms. Michaux's refusal to sign at that time was not improper either. *In re Simpson*, 147 B.R. 14, 16 (Bankr. E.D.N.C. 1992); *see also Gregg*, 199 B.R. at 409 (creditor entitled to adequate protection only after 45-day performance period expired). The Court is convinced it would be inappropriate to sanction the debtor or her attorney for failing to agree to such an early stay relief request. When CACU filed its motion for stay relief, sanctions, and adequate protection on June 6, the 45-day performance deadline had not passed, so the debtor had no duty to surrender the property yet and cannot be held responsible for the filing fee CACU had to pay.

Ultimately, the debtor did not surrender the car until July 1, ten days after her 45-day performance period expired (counting from her May 7 oral statement of intention). By that time, however, CACU had already filed its motion for stay relief, sanctions, including attorney fees, and adequate protection, and noticed it for hearing on July 11. The debtor opposed the sanctions and adequate protection parts of the motion, and surrendered the car ten days before the hearing on the motion. Although the debtor could be held accountable for use of the vehicle after the expiration of her §521(2)(B) performance period, *see Gregg*, 199 B.R. at 409, given the nominal time involved and the nominal depreciation of the vehicle during that time, the Court does not believe the circumstances of this

case justify imposing either sanctions or an adequate protection obligation on the debtor or her counsel.

CACU was certainly free to seek early cooperation from the debtor and Ms. Michaux, but had no right to compel them to cooperate at the time it asked the Court for such relief. Simply put, CACU jumped the gun by seeking sanctions before the debtor had failed to perform her duties under §521(2). Only after CACU acted prematurely did the debtor fail to timely perform under §521(2)(B), and even then, she fulfilled her duty ten days before the hearing on CACU's motion. The Court is not saying that relief will never be available to a creditor in similar circumstances, just that the relief CACU sought was not appropriate in this case.

For these reasons, the Court concludes that CACU's motion for sanctions and adequate protection must be denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this ____ day of November, 2001.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE