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U.S. BANAMUPIUT COCO. TOO THE DISTRICT OF ARIZONA

## IN THE UNITED STATES BANKBUPTCY COURT

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DISTRICT OF ARIZONA  ) Chapter 13 ) ) No. 2:06-bk-04089-JMM
) ) No. 2:06-bk-04089-JMM
)
) MEMORANDUM DECISION)
ntion for stay relief was held on January 31, 2007. The Debtor
itor Joseph Rocco represented himself. Both Mr. Rocco and
one time practiced law together. After consideration of the
aw, and the arguments of the parties, the court now rules.
e Chapter 13 Case
3 relief on December 5, 2006. The debts which they scheduled
lowing amounts:
\$209,494
81,952
r month, and take home \$10,975 (Schedule I). Their monthly
able contributions" of \$650 and "recreation" of \$30

The repayment plan proposed by the Debtors is a five-year plan, paying \$2,300 per month. Over 60 months, that sum would total \$138,000. After deduction for the Trustee's expenses (10%), the net available to creditors would be \$114,200.<sup>2</sup>

The creditor which is secured by a first lien on the Debtors' home is to be paid "outside" the plan, and not through the Trustee. However, the current arrearage of \$1,727.28 is to be paid through the plan. The second mortgage is current and is likewise to be paid "outside" the plan.

The bank which is secured by the 2001 Chevrolet is to receive \$110 per month through the plan, until it is paid \$11,077.77, plus interest.

Dell Computer is to receive \$200. It is secured by the machine.

Unsecured claims are to share the difference, pro rata. The Debtors' reconciliation, attached to the plan, reflects that unsecured creditors will receive 100% of their allowed claim amounts, no doubt because the Trustee is currently receiving less than the 10% maximum commission. Thus the Debtors' plan pays out in approximately the following manner:

Total paid in (60 months)		\$138,000	
Less:	Trustee fee (maximum)	( <u>13,800</u> )	
Subto	tal	\$114,200	
Less:	Tahoe vehicle Arrearage (home) Dell Computer	( 11,077) ( 1,727) (200)	
Subto	tal	\$101.396	

The unsecured claims listed in the schedules total \$106,737.3

The single largest unsecured claim, which is based on a Superior Court judgment, is listed as \$73,952. It is owed to Joseph Rocco, and is listed as "disputed." Mr. Rocco's judgment is actually for something less than it was scheduled for, \$64,192.25. This lower figure then would appear to allow for a 100% dividend to unsecured creditors, even if the Trustee's commission remains at 10%.

If the Trustee is presently collecting less than 10%, that figure would adjust upward.

Unpaid and unapplied attorneys' fees may further erode this figure.

The rub comes with respect to the judgment of November 6, 2006.<sup>4</sup> The judgment is not yet final, and the Debtors desire to appeal it to the Arizona Court of Appeals. In so doing, they will also, no doubt, object to the Rocco claim pursuant to FED. R. BANKR. P. 3007. Because Debtors may continue to prosecute or defend extant claims before other courts or tribunals, FED. R. BANKR. P. 6009, the ultimate conclusion of that state court litigation will determine whether Mr. Rocco has a claim at all, and if so, in what amount.

## The Motion for Stay Relief

Between the entry of the state court judgment on November 6, 2006, and the filing of the instant chapter 13 petition on December 5, 2006, Mr. Rocco began execution on the judgment. He caused writs of garnishment to be levied on Jeffrey King's employer, and upon the Kings' bank accounts.

The employer answered, noting that it was holding \$758.94 under the writ. The bank also answered, disclosing the sum of \$1,791.26 to be subject to the writ. Before the judgment creditor could obtain a judgment against either garnishee-defendant, the chapter 13 case was filed.

In addition, Mr. Rocco served a writ of garnishment on the professional corporation of Jeffrey A. King, P.C., which answered that it held 100 shares of common stock. The value of such shares is unknown, since Mr. King is now employed by a different firm, Kent & Wittekind.

When the bankruptcy was filed, the automatic stay of 11 U.S.C. § 362(a) prevented Mr. Rocco from proceeding further in state court, and he now seeks to have the stay lifted so that he can reduce the garnishments to judgment and collect on them, applying the garnished sums against his judgment.

## The Law

The automatic stay is one of the most fundamental protections in bankruptcy cases. It freezes the case in its current posture, thereby preventing a "race to the courthouse" and a piecemeal dismemberment

<sup>&</sup>lt;sup>4</sup> Maricopa County Superior Court Cause No. CV 2002-018141.

of a debtor's estate. In so doing, it provides the estate with the necessary breathing room to centralize and collect assets in an orderly manner, or offer a reorganization plan to its creditors while preserving a debtor's value short of liquidation.

In a proper chapter 13 case, reorganization is the goal, and unlike a chapter 11, a debtor is required to quickly file a plan.

Here, the Debtors have done so, and their plan reveals a full payout to their unsecured creditors, over a time period authorized by bankruptcy law. In so doing, they are committing to pay--each month--the sum of \$2,300 to the Trustee, who will then distribute those funds to the creditors. If the Debtors fail to do so, their case is subject to dismissal. 11 U.S.C. § 1307.

The Debtors should have the opportunity to present a case for confirmation of their plan. If they do so, all of their property will re-vest in them, and creditors and the Debtors alike will be bound by the terms of the confirmed plan. 11 U.S.C. § 1327. Since the plan will, if all payments are made, return 100% to every unsecured creditor on all allowed claims, the pending garnishments will be rendered moot.

According to Arizona law, since none of the garnishments were reduced to judgment, prior to the filing of the bankruptcy petition, they were never perfected. Therefore, Mr. Rocco's claim was unsecured on the date of filing. See ARIZ. REV. STAT. § 12-1598(D)(4).

## Conclusion

The court is not persuaded that the necessary "cause" under 11 U.S.C. § 362(d)(1) has been shown, which would allow a single unsecured creditor to (1) deplete the Debtors' estate for its sole benefit, and (2) prefer itself over the pro rata payment policy implicit in a chapter 13 term payout. Since no issues remain for a final hearing, an order will be entered which concludes this administrative matter.

Accordingly, a separate order will be entered which denies the motion for stay relief. Any	
appeal must be taken within ten days of that order. FED. R. BANKR. P. 8002.	
DATED: February 2, 2007.	
JAMES M. MARLAR UNITED STATES BANKRUPTCY JUDGE	
COPIES served as indicated below	
this 2nd day of February, 2007, upon:	
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The Honorable Barry C. Schneider Judge, Maricopa County Superior Court	
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By /s/ M B Thompson	
Judicial Assistant	
	appeal must be taken within ten days of that order. FED. R. BANKR. P. 8002.  DATED: February 2, 2007.  JAMES M. MARLAR UNITED STATES BANKRUPTCY JUDGE  COPIES served as indicated below this 2nd day of February, 2007, upon:  Allan D. NewDelman Allan D. NewDelman PC 80 E. Columbus Ave. Phoenix, AZ 85012 Attomeys for Debtors Email: anewdelman@uswest.net  Russell A. Brown, Trustee P.O. Box 33970 Phoenix, AZ 85004-3970 Chapter 13 Trustee Email russell.a.brown@azbar.org  Joseph P. Roeco Rocco Law Firm 7325 N. 16th St., Suite 120 Phoenix, AZ 85020 Pro Se U.S. Mail  The Honorable Barry C. Schneider Judge, Maricopa County Superior Court 201 W. Jefferson, Suite 13-A Phoenix, AZ 85003-2205 Email: bschneid@superiorcourt.maricopa.gov  Office of the United States Trustee 230 North First Avenue, Suite 204 Phoenix, AZ 85003-1706 U.S. Mail

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9	By /s/ M. B. Thompson
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