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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
SARA LEE GRESHAM,)	
a/k/a SARA LEE HASELRIG,)	CASE NO. 06-60027-MHM
)	
Debtor.)	

MEMORANDUM OF OPINION

This matter is before the court on Debtor's Motion for Order of Stay as to Willie Gresham and Approval of Debtor's Amendment Adding Jennie Gresham as an Unsecured Creditor (the "Motion"). Hearing on the Motion was held July 24, 2008. Present at the hearing were Debtor, Debtor's attorney, attorney for the Chapter 13 Trustee, and Jennie Gresham *pro se*.

The allegations in the motion and the presentations at the hearing show that Debtor and her former spouse divorced in August 2005. The divorce settlement agreement provided that Debtor would pay Jennie Gresham, presumably a relative of Debtor's former spouse, \$1,175. The divorce settlement agreement does not identify the relationship between Debtor and Jennie Gresham and does not identify the basis for the debt.

January 2, 2006, Debtor filed this Chapter 13 bankruptcy case and failed to list Jennie Gresham as a creditor. On June 12, 2008, Debtor filed an amendment to her

schedules adding Jennie Gresham as an unsecured creditor [Doc. No. 48]. Notice of the amendment was mailed to Jennie Gresham June 12, 2008, but it appears that no notice was provided to Willie Gresham. On June 18, 2008, a hearing was held in state court, Civil Action File No. 08-10-3783, on a motion for contempt filed by Debtor's former spouse, based upon Debtor's failure to pay Jennie Gresham. The state court judge issued a contempt order requiring Debtor to pay Jennie Gresham in full within 60 days or be incarcerated. Debtor represented, however, that the state court judge indicated that Debtor's contempt would be deemed purged if an order was entered by the bankruptcy court approving the amendment adding Jennie Gresham as a creditor.

Following the hearing, on July 31, 2008, Debtor filed a post-confirmation modification of her Chapter 13 plan that provides for an increase in the monthly plan payment and provides for payment in full of Jennie Gresham's priority claim at the rate of \$75 per month [Doc. No. 58]. In support of the amendment to the Chapter 13 plan, Debtor also filed an amended Schedule I (income) and Schedule J (expenses) [Doc. No. 59], copies of pay advices [Doc. No. 61, 62], and an amended Employer Deduction Order [Doc. No. 60], reflecting the higher plan payment.

An action taken in violation of the automatic stay of 11 U.S.C. §362(a) is void, irrespective of whether the creditor had notice of the filing of the bankruptcy case.

Roberts v. C.I.R., 175 F. 3d 889 (11th Cir. 1999); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982). The stay arises automatically, by operation of law, upon

the filing of a bankruptcy petition. The stay is effective without regard to a creditor's notice of the bankruptcy filing. *Ford v. Loftin*, 296 B.R. 537 (Bankr. N.D. Ga. 2003) (J. Bonapfel). A lack of notice merely protects a creditor from a finding of *willful* violation of the stay, which would subject a creditor to sanctions under §362(k). *Mitchell Construction Co., Inc. V. Smith*, 180 B.R. 311 (Bankr. N.D. Ga. 1995). Therefore, Willie Gresham's contempt action against Debtor was subject to the automatic stay, irrespective of his or Jennie Gresham's notice of Debtor's bankruptcy case, and his prosecution of the contempt action without obtaining relief from the bankruptcy court violated the stay.¹

Section 362(b)(2) provides:

The filing of a petition...does not operate as a stay...

(2) under subsection (a) –

(A) of the commencement or continuation of a civil action or proceeding

- (i) for the establishment of paternity;
- (ii) for the establishment or modification of an order for domestic support obligations²; or

¹ Willie Gresham could have filed a motion or taken other action in this court to obtain monetary relief for Jennie Gresham, which would have been a more productive utilization of legal resources. Filing a contempt action in state court rather than a motion in this court was both incorrect and excessive: like chopping down a door with a blunt instrument instead of knocking or ringing the doorbell. This court is responsive to the needs of debtors and creditors alike, contrary to uninformed assumptions to the contrary.

² A “domestic support obligation” is defined in 11 U.S.C. §101(14A) as:

...a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under any applicable nonbankruptcy law notwithstanding any other provision of this title, that is –

(continued...)

- (iii) concerning child custody or visitation;
- (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
- (v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a profession or occupational license, or a recreational license, under State law, as specified in section 466 (a)(16) of the Social Security Act;

²(...continued)

(A) owed to or recoverable by –

- (i) a spouse, former spouse, or a child of the debtor or such child's parent, legal guardian, or responsible relative; or
- (ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –

- (i) a separation agreement, divorce decree, or property settlement agreement;
- (ii) an order of a court of record; or
- (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

- (iii) concerning child custody or visitation;
- (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
- (v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a profession or occupational license, or a recreational license, under State law, as specified in section 466 (a)(16) of the Social Security Act;

(A) owed to or recoverable by –

- (i) a spouse, former spouse, or a child of the debtor or such child's parent, legal guardian, or responsible relative; or
- (ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –

- (i) a separation agreement, divorce decree, or property settlement agreement;
- (ii) an order of a court of record; or
- (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

In a Chapter 7 case, exempt property and postpetition earnings are not property of the estate and are subject to collection of domestic support obligations without the necessity of the filing of a motion for relief from stay or an adversary proceeding. *Summerlin v. Summerlin*, 26 Bankr. 875 (Bankr. E.D.N.C. 1983). In a Chapter 13 case, however, the extent of §362(b)(2) as an exception to the automatic stay is much more limited. Section 362(b)(2) expressly limits its coverage to actions against property that is not property of the estate. In a Chapter 13 case, the estate includes not only Debtor's prepetition property and earnings of Debtor but also Debtor's postpetition property and earnings. *Carver v. Carver*, 954 F. 2d 1573 (11th Cir. 1992). Also, in this case, post-confirmation property is also property of the estate by virtue of the confirmation order [Doc. No. 26]. Therefore, "the exception in 11 U.S.C. §362(b)(2) has little or no practical effect in Chapter 13 situations." *Id.* at 1577.

The automatic stay of 11 U.S.C. §362(a) does not operate to preclude incarceration pursuant to a state court order for criminal contempt. *In re Maloney*, 204 B.R. 671 (Bankr. E.D. N.Y. 1996). The automatic stay *does* bar state court contempt proceedings,

and incarceration thereunder that is intended to compel a debtor to pay a domestic support obligation or any other obligation arising from a divorce decree. *In re Moon*, 201 B.R. 79 (Bankr. S.D. N.Y. 1996).

Pursuant to Bankruptcy Rule 1009, Debtor may freely amend her petition at any time before the case is closed. Therefore, approval of Debtor's amendment to add Jennie Gresham as a creditor is unnecessary. Debtor has taken the appropriate steps to disclose and provide for payment in full of Jennie Gresham's claim. Under Bankruptcy Rule 3015, parties in interest must receive notice of post-confirmation modifications of a Chapter 13 plan and may file objections. Debtor filed and served such a notice; the deadline for objections to Debtor's post-confirmation modification of her plan is August 25, 2008 (Doc. #58). If no objections are filed, the plan as modified shall stand approved. 11 U.S.C. §1329(b).

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, Jennie Gresham, Willie Gresham, the Chapter 13 Trustee, and upon the Honorable J. Stephen Schuster, Cobb County Superior Court.

IT IS SO ORDERED, this the 8th day of August, 2008.


MARGARET M. MURPHY
UNITED STATES BANKRUPTCY JUDGE