



**IT IS ORDERED as set forth below:**

**Date: April 10, 2008**

*James E. Massey*

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
IN RE:

CASE NO. 08-62839

Eddie Patrick Milledge,

CHAPTER 13

Debtor.

JUDGE MASSEY

\_\_\_\_\_  
Independent Dealers Advantage, LLC,

Movant,

v.

CONTESTED MATTER

Eddie Patrick Milledge,

Respondent.

\_\_\_\_\_  
Danco Financial,

Movant,

v.

CONTESTED MATTER

Eddie Patrick Milledge,

Respondent.

## ORDER DENYING MOTIONS FOR RELIEF FROM AUTOMATIC STAY

On April 1, 2008, Independent Dealers Advantage, LLC and Danco Financial, Inc. filed separate motions for relief from stay to recover and dispose of vehicles belonging to Debtor. The word “consent” was added to the docket text for each motion by Movants’ counsel and does not appear in the titles of the motions themselves. These are not consent motions because there is no showing that Debtor consented to the relief demanded. Movants attached to the motions and presented electronically proposed orders showing that the Trustee does not oppose the motions.

Each motion states in paragraph 4:

The Debtor had a previous case filed within a year of the current case, case number 07- 64342-JEM. The Debtor failed to file a Motion under Section 362(c)(3)(B). Therefore the stay terminated with respect to the debtor on the 30th day after filing of this case. The estate still has an interest in the property. Since there is no equity the estate should not oppose stay relief.

Section 362(c)(3)(A) and (B) provide:

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]

As Movants have alleged, Debtor had one prior case pending in the one-year period preceding the filing of the present case, and Debtor has not filed a motion pursuant to section

362(c)(3)(B) to extend the stay. Movants acknowledge that the failure to Debtor to obtain an order extending the stay means that the stay is terminated with respect to the Debtor but that the vehicles remain property of the estate.

Movants' construction of these statutory provisions is correct. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1818, 100 L.Ed.2d 313 (1988). Section 362(a)(3) provides that the automatic stay applies to "any act to obtain possession of property of the estate" and section 362(a)(6) provides that the automatic stay applies to "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." The phrases "property of the estate" and "property of the debtor" are terms of art in section 362 and elsewhere in the Bankruptcy Code.

In contrast to the language in section 362(c)(3)(A) that the stay terminates "with respect to property of the debtor," section 362(c)(4)(A) provides that if a debtor had two or more cases pending within the one year period preceding the filing of the current case, the automatic stay "shall not go into effect." The condition that no stay exists with respect to property of the debtor is not congruent with the condition that no stay exists. Thus, the relief provided in section 362(c)(3)(A) extends only to property of the debtor.

Although acknowledging that each vehicle is property of the estate, Movants contend that because the Chapter 13 Trustee does not oppose the motions, they are entitled to relief from the stay. Movants are mistaken. Although speaking for the estate for certain purposes, a Chapter 13 trustee does not abandon estate property merely by not opposing a motion for relief from the stay.

Assuming that a Chapter 13 Trustee could abandon property of the estate, section 554(a) would require notice to all parties in interest, including the debtor, and an opportunity to be heard. The limited role of the Chapter 13 trustee in dealing with estate property is also illustrated by that fact that section 1302, dealing with the powers of a trustee, does not empower a Chapter 13 Trustee acting alone to dispose of estate property. Furthermore, in a Chapter 13 case, the debtor retains possession of property of the estate. Here, the plan as amended seeks to provide for each of Movants' claims as a secured claim; he has given no indication in the plan or in any other document filed in this case that he wishes to surrender either vehicle. Perhaps the Trustee does not oppose the motions because she is convinced that Debtor cannot get his plan confirmed, but the record on this point is virtually silent because it is theoretically possible for Debtor to cure the Trustee's objections to confirmation.

Relief from the automatic stay as to property of the estate is governed in part by section 362(d)(1), which begins, "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay" [on certain conditions]. There has been no hearing held on these motions. Debtor is entitled to notice and a hearing because he has an interest in the property of the estate just as Movants do. The possessory interest of a debtor in a Chapter 13 case is alone enough to require that the debtor be afforded notice and a hearing on a motion for stay relief. Similarly, if the Debtor and Trustee proposed to sell the vehicles, Movants would be entitled to notice and an opportunity to be heard under section 363(b). Section 362(d) cuts the same way.

The argument made in the motions that "[s]ince there is no equity the estate should not oppose any relief" is without merit as stated. Lack of equity is one factor to be considered in

deciding a motion for stay relief, as is the more fundamental question of whether the debtor can provide adequate protection of the interest of the secured creditor in that property. It may be that Mr. Milledge has no chance to confirm a plan and that, as Movants contend in their motions, cause exists for stay relief. If so, Movants may have their day in court by complying with section 362(d) so that Mr. Milledge has notice and an opportunity to be heard.

Insofar as the motions seek termination of the stay with respect to the Debtor, the Court confirms pursuant to 11 U.S.C. §362(j) that the stay is terminated as to the Debtor. In all other respects the motions DENIED.

\*\*\*END OF ORDER\*\*