

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>89-10417</u>
RIGARDO ANTONIO RUSH)	
ARTICE R. RUSH)	
)	
Debtors)	
_____))	
FIRST UNION MORTGAGE CORPORATION)	FILED
)	at 5 O'clock & 45 min. P.M.
Movant)	Date: 12-14-90
)	
vs.)	
)	
RIGARDO ANTONIO RUSH)	
ARTICE RUSH))	
AND SYLVIA FORD DRAYTON)	
CHAPTER 13 TRUSTEE)	
)	
Respondents)	

ORDER

First Union Mortgage Corporation ("First Union") the holder of an allowed secured claim in this Chapter 13 proceeding alternatively seeks relief from the automatic stay of 11 U.S.C. §362(a) in order to foreclose its security interest in property of the debtors, conversion of this case to a case under Chapter 7 or dismissal. In response to the motion the debtor, Rigardo A. Rush, pro se seeks a stay of the hearing on First Union's motion pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, (50 USCS

Appx. §521. The relevant facts established by the record in this Chapter 13 proceeding are as follows:

1. The debtors, Rigardo Antonio Rush and Artice Rush, husband and wife, filed their petition for relief under Chapter 13 of the Bankruptcy Code on March 23, 1989.

2. The debtors' petition asserts an exemptible joint ownership interest as their home place, real property identified as 2949 Dahlia Drive, Augusta, Richmond County, Georgia, with a fair market value of Fifty-Seven Thousand and No/100 (\$57,000.00) Dollars encumbered by a first security interest held by First Union dated May 1, 1987 in the amount of Fifty-Seven Thousand and No/100 (\$57,000.00) Dollars.

3. The allowed secured claim of First Union reflects an amount due . of principal, accrued interest and late fees as of the date of the bankruptcy filing totaling Fifty-Five Thousand Seven Hundred Fifty Three and 17/100 (\$55,753.17) Dollars. The proof of claim also asserts a prepetition payment arrearage of One Thousand One Hundred Forty-One and 13/100 (\$1,141.13) Dollars and a regular monthly payment amount of Five Hundred Twenty Nine and 29/100 (\$529.29) Dollars.

4. The schedules also reveal that debtor Rigardo Antonio Rush was as of the date of filing a soldier in the United States Army with 11 years of service.

5. The modified plan as confirmed by order dated August 24, 1989

provides for payments to the Chapter 13 Trustee in the amount of Four Hundred Thirty-Five and No/100 (\$435.00) Dollars per month to pay all allowed claims in full. Regarding the allowed claim of First Union, the plan provides that "debtors shall make regular postpetition payments as they come due to creditors (named below) holding a security interest in debtor's residence. Any claim filed for prepetition arrearage on such obligation shall be paid by distributions from the Chapter 13 Trustee. First Union Mortgage Corp."

6. By motion filed August 31, 1989 the debtors sought court approval for an advance on Mr. Rush's United States Army pay in order to pay moving expenses for their relocation to Germany scheduled for October, 1989. Following notice and hearing, this court approved the request by order dated September 18, 1989.

7. The motion for relief from stay now under consideration was filed March 21, 1990. However, the movant failed to serve the notice upon the debtor, Rigardo Antonio Rush at his current address COC 440th Sig. Bn., APO, New York, New York 09175. The hearing was continued to afford appropriate service to Mr. Rush. In response to the new notice of hearing, Mr. Rush filed his pro se petition for stay of hearing on First Union's motion under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 USCS Appx. 521). Mr. Rush asserts in his petition:

That he is now in the military service of the United States. That he entered such service in July, 1977 and is presently assigned to the U.S. Army, C Company 440st Sig. Bn. Darmstadt, Federal Republic of Germany, APO New York 09175. That he expects to return to the United States on or about 30 October, 1992. That the ability of this defendant to make his defense to said cause of action is materially impaired and affected by reason of his military service in that he is prevented by reason of said service, overseas assignment, lack of funds, and insufficient leave time, from personal attendance upon the proceeding. That a judgment against him in the said cause of action would prejudice his rights and result in damage to him. Wherefore, this defendant prays that

further proceedings herein be stayed as provided in the Soldiers' and Sailors' Civil Relief Act of 1940 50 U.S.C. 521 until at least 30 November, 1992 and for such other and further relief as to this court may seem just and proper.

8. First Union in its motion asserts that the debtors have defaulted in making postpetition mortgage payments as required under the terms of their confirmed Chapter 13 plan. This default establishes a for cause basis for the grant of relief from stay pursuant to 11 U.S.C. §362(d)(1) or, alternatively dismissal or conversion based upon a material default by the debtor with respect to a term of their confirmed plan pursuant to 11 U.S.C. §1307(c)(6).

The debtor, Rigardo Antonio Rush in seeking a stay of hearing relies upon the Soldiers' and Sailors' Relief Act of 1940 (50 USCS Appx. §521) which provides:

At any stage thereof any action or any proceeding in any court in which a person in military services is involved, either as plaintiff or defendant, during the

period of such service or within 60 days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [50 USCS Appx. §501 et seq.], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

This debtor's application for stay of proceeding does not request a stay of a foreclosure action against the property in question. The debtor requests a stay of hearing on First Union's motion for relief from the automatic stay of 11 U.S.C. 362(a) or dismissal or conversion of his case in this court. The debtor seeks an opportunity to defend against this motion, not a foreclosure action. Therefore, movant's reliance upon 50 USCS Appx. §517¹ is not applicable to the matter now before the court.

First Union is correct in its assertion that as the debtor was a member of the military service at the time the note and security interest was executed, the

¹50 USCS Appx. 517 provides in pertinent:

Nothing contained in this Act [50 USCS Appx. 501 et seq.] shall prevent - . . .
(b) the repossession, retention, foreclosure, sales, forfeiture, or taking possession of property which is security for an obligation or which has been purchased or received under a contract, lease, or bailment
Pursuant to a written agreement of the Parties thereto including the person in military service concerned, or the person to whom section 106 [50 USCS Appx. 516] is applicable, whether or not such person is a party to the obligation, or their assigns, executed during or after the period of military service of the person concerned or during the period specified in section 106 [50 USCS Appx. §516]. (emphasis added)

foreclosure based upon the debtors' default under that obligation is not stayed under the Soldiers' and Sailors' Relief Act of 1940 (50 USCS Appx. §501 et seq.). However, as stated, the debtor, Rigardo Antonio Rush, does not seek to stay a foreclosure action, but seeks to stay a hearing on First Union's motion now before the court. At this stage, First Union seeks alternatively relief from the automatic stay of 3'62(a) of the Bankruptcy Code or conversion or dismissal of this case. Mr. Rush wishes an opportunity to defend against this motion. First Union's reliance upon section 517 of the Soldiers' and Sailors' Relief Act of 1940 does not apply to this pending motion.

Under 50 USCS Appx. §521 the debtor Rigardo Antonio Rush is entitled to a stay of hearing on First Union's motion in this Chapter 13 proceeding "unless in the opinion of the court, the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service." See, Hackman v. Postell, 675 F.Supp. 1132 (N.D. Ill. 1988). "[T]rial courts have discretion in determining whether or not a member of the military service is acting in good faith and whether or not military service materially affects his ability to prosecute or defend an action." T.I.C. Federal Credit Union v. Diaz (In re: Diaz) 82 B.R. 162, 163 (Bankr. M.D. Ga. 1988) [citing Boone v. Lightner, 319 U.S.

561, 63 S.Ct. 1223, 87 L.E. 1587 (1943), reh'g denied, 320 U.S. 809, 64 S.Ct. 26, 88 L.E. 489 (1943)].

The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obligated to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence results from the service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial. But in some few case absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Boone v. Lightner supra 319 U.S. at 575, 63 S.Ct. at 1231, 87 L.E.

at 1596.

This court is charged with the responsibility of protecting the rights of the debtors under the Bankruptcy Code and their right to a full fair hearing with adequate opportunity to put forth their defenses as protected under the Soldiers' and Sailors' of 1940 (50 USCS Appx. §521). However, the debtors rights must be balanced with the rights of the creditor, First Union, to a prompt disposition of its motion as contemplated under the Bankruptcy Code. See 11 U.S.C. §362(e)².

The original Act [Soldiers' and Sailors' Civil Relief Act] of 1918 was passed during World War I at a time when communications and technology were not very far advance by modern day standards. The Soldiers' and Sailors' Civil Relief Act was enacted in 1940 just prior to the United States' entry into World War II. Although communications had improved tremendously since 1918, there had been far more advances since that time. Air mail can carry written communication from this

²11 U.S.C. §362(e) provides:

Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonably likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than 30 days after the conclusion of such preliminary hearing.

country to Germany in a period of a few days. Therefore, a circle of communication in writing can be expected within two weeks at the most. Regular telephone communication may be obtained with Germany instantly. Court reporters may take depositions in Germany including video tape depositions for use at trial in this country.

In re: Diaz supra at 165.

This court is of the opinion that the ability of the debtors to conduct their defense is not materially affected by reason of Mr. Rush's military service provided sufficient time safeguards are

present to allow for communication between the debtors in Germany and their attorney and, a sufficient pretrial discovery period is afforded the parties. The testimony of the debtors may be taken by deposition upon oral examination or written question pursuant to Federal Rules of Civil Procedure 30 and 31; and discovery may be had through the use of interrogatories, request for production of documents and request for admissions pursuant to Federal Rules of Civil Procedure 33, 34 and 36, respectively. Bankruptcy Rules 7030, 7031, 7033, 7034, 7036 and 9014³.

³Bankruptcy Rule 9014 provides:

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the parties against whom relief is sought. No response is required under these rules unless the court orders an answer to the motion. The motion shall be served in a manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs the following rules shall apply: . . . [7028 - 7037]. . . .

By use of the foregoing civil procedure rules, the ability of the debtor to defend against the motion now before the court is not materially affected by reason of his military service. However, the time necessary to implement these procedures will prejudice the rights of First Union to a prompt hearing as contemplated under 362(e) of the Bankruptcy Code. First Union's motion is premised upon the failure of the debtors to meet the postpetition payment

obligations due it in accordance with its note and deed to secure debt according to the provisions of the debtors' confirmed plan. First Union's interest in its collateral is adequately protected so long as the debtors comply with the provisions of their plan and make the postpetition mortgage payments. According to First Union's allowed claim, the regular monthly payment is Five Hundred Twenty Nine and 29/100 (\$529.29) Dollars and this amount should be paid to First Union on the first day of each month in accordance with the terms of the debtors' confirmed plan. Provided the debtors meet their plan payment obligations, First Union's interest will be adequately protected during discovery on this motion.

This court having determined that the debtors ability to defend the motion now before the court is not materially affected by reason of his military service, the application for stay pursuant to the Soldiers' and Sailors' Relief Act of 1940 (50 USCS Appx. §521) is ORDERED denied;

Further ORDERED that the motion for relief from stay and alternatively conversion or dismissal of this case brought by First Union Mortgage Corporation is ORDERED continued pending the completion of discovery which discovery shall be completed on or before April 1, 1991;

Further ORDERED the debtors, through their counsel of record in this proceeding, shall file an answer to the motion in compliance with Bankruptcy Rule 7012 on or before January 18, 1991;

Further ORDERED the debtors shall pay into the registry of this court on or before January 18, 1991 and on or before the 15th day of each month thereafter

until further order of this court, the sum of Five Hundred Twenty Nine and 29/100 (\$529.29) Dollars representing the postpetition payments to First Union as required under the confirmed plan. In the event the debtors fail to meet the payment obligations as required under this order, such failure shall be deemed a material default with respect to a term of their confirmed plan [11 U.S.C. §1307(c)(6)] and shall result in dismissal as a willful failure of the debtors to abide by the order of this court [11 U.S.C. §109(g)(1)]. First Union's counsel of record in this proceeding is charged with the requirement of monitoring compliance by the debtors.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 14th day of December, 1990.