

362 struck  
355-reinstated

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
Brunswick Division

In the matter of:  
CINDY M. DAY  
d/b/a Mulchman  
d/b/a The Nursery Exchange  
Debtor

Chapter 13 Case  
Number 90-20143

CINDY M. DAY  
Movant

v.  
FIRST FEDERAL SAVINGS  
BANK OF BRUNSWICK  
Respondent

**FILED**  
at 4 O'clock & 22 min. P.M  
Date 6/4/90  
MARY C. BECTON, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *PCB*

MEMORANDUM AND ORDER  
ON MOTION FOR USE OF CASH COLLATERAL

On May 17, 1990, the Court considered the Motion for Use of Cash Collateral filed by the Debtor who alleged that her Chapter 13 case filed on March 6, 1990, was dismissed by the Court, that immediately following the dismissal of the action First Federal

Savings Bank of Brunswick ("First Federal") set off against funds in her account in the amount of \$5,331.30, that subsequent to the exercise of the Bank's right of offset the Court on May 3, 1990, ordered the case be reinstated and that Debtor is in need of use of the offset funds with which to succeed as a Chapter 13 Debtor.

After consideration of the evidence and briefs filed by the parties I make the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

On March 6, 1990, Debtor's Chapter 13 petition was filed, together with a plan which proposed payment of \$2,000.00 monthly to the Chapter 13 Trustee. The plan proposed payment of all Debtor's obligations in full over the life of the plan. On March 8, 1990, this Court entered an order requiring Debtor to file Schedules A and B on or before March 21, 1990, as required by the applicable Bankruptcy Code and Rules. On March 8, 1990, a notice of the filing of the Debtor's case was issued by the Clerk's Office and set the Section 341 Meeting of Creditors in Brunswick, Georgia, for April 11, 1990, at 2:30 p.m. At the Creditors' Meeting on April

11, 1990, Debtor failed to appear and the Trustee informed Debtor's counsel who was present and all other parties in interest that the continued 341 Meeting would be held May 2, 1990, at 2:00 p.m. and that no further written notice would be issued. On April 17, 1990, this Court entered an order dismissing the Chapter 13 case due to the Debtor's failure to file the necessary papers as required by this Court's order dated March 8, 1990.

On May 1, 1990, Debtor filed Schedules A and B in the form required by this Court's March 8th order, but not within the time set in that order for filing. On May 1, 1990, Debtor also filed a Petition to Reinstate her case alleging that she was entitled to relief under Chapter 13 and praying that her case be reinstated. On May 3, 1990, I entered an order reinstating the case and the Clerk's Office issued an order rescheduling this case for a 341 Meeting for May 30, 1990, at 2:30 p.m., in Brunswick. The Continued 341 Meeting scheduled for May 2, 1990, at 2:00 p.m., had been vacated as a result of the Court's prior dismissal of the case.

On April 24, 1990, during the period of time that the case stood dismissed, that is between April 17th and May 3rd, First Federal exercised its right of set off against the business account

of the Debtor and withdrew \$5,331.30 from that account. This sum represented the balance of Debtor's note with First Federal as of the date of the set off and was made pursuant to provisions of the note. At the time of the set off by First Federal Debtors's account with the Bank was in default. The promissory note executed by the Debtor granted to First Federal "a blanket lien on all inventory, fixtures and equipment of Cindy Day Fine Nursery . . . " and provided further that "the above described collateral shall further be taken to include the following: All dividends and distributions on and other rights in connection therewith; any and all balances, credits, deposits, accounts, items, monies, and other choses in action or chattel papers of the undersigned now or hereafter in the possession of the holder."

#### CONCLUSIONS OF LAW

Debtor argues that the legal effect of this Court's order reinstating her case was to reactivate the case retroactively with the result being that any creditor action taken in the interim is voided pursuant to the provisions of 11 U.S.C. Section 362. Debtor cites the definition of reinstatement as "to reinstall; to re-establish; to place again in a former state, condition, or

office; to restore to a state or position from which the object or person has been removed". This definition of the term "reinstatement" certainly gives support to the Debtor's position in this case. On the other hand, there is no specific provision of the Bankruptcy Code and Rules governing reinstatement of cases nor is there any provision which governs the scope of the automatic stay of Section 362 with respect to a reinstated case. Historically the concept of reinstatement has derived from the Court's authority to alter or amend judgments pursuant to Bankruptcy Rule 9023 or to correct clerical mistakes in judgments, orders, or other parts of the record pursuant to Bankruptcy Rule 9024.

I conclude that the effect of reinstatement of a case must be determined in light of the reasons for such reinstatement. For example when a case is dismissed or other action is taken as the result of clerical error or arising from oversight or omission and where there is no fault attributed to a debtor or its counsel such case may appropriately be reinstated nunc pro tunc so as to permit the case to proceed as if the dismissal had never occurred. In this event the stay would revive retroactively and be deemed to have been continuously in effect throughout the period of dismissal. However, where a dismissal is properly entered and a case is later reinstated I find that no automatic reimposition of the stay can be inferred.

In this case Debtor's Motion to Reinstate the case set forth the following:

Petitioner shows it took longer than anticipated to secure the names, addresses and amounts of her personal debts for inclusion in the Schedules.

Petitioner shows further records had to be located to include all creditors for the business and that some of said records were held by the accountant.

Petitioner shows that she has been under an undue strain and stress in the gathering of such information.

Petitioner shows she is entitled to the relief of a Chapter 13 Wage Earner Plan.

Petitioner prays that her case be reinstated and that she be allowed to make payments to the Trustee as proposed.

These allegations appear in Debtor's Petition to Reinstate filed on May 1, 1990, and because the Debtor made a showing sufficient to the Court, her case was ordered reinstated for the sole purpose of permitting her to make future payments to the Chapter 13 Trustee. The Order entered on May 3, 1990, made no finding that the automatic stay was to be retroactively applied. Because I find that the case was properly dismissed on April 17, 1990, because Debtor had failed to comply with the provisions of this Court's order dated March 8, 1990, which Order simply enforces the requirements of the Bankruptcy

Code and Rules to file certain papers within fifteen (15) days after the filing of a case, I conclude that it would be inappropriate for the stay to be retroactively reinstated so as to void the action of First Federal Savings Bank of Brunswick when it exercised its state law right of set off. Debtor's case had been pending over five (5) weeks at the time of dismissal, no payment had been made to the Trustee, she had missed the April 11, 1990, creditors' meeting and her Schedules A and B were not timely filed. As of that point in time, creditors were being held at bay and Debtor's case was deficient in several material respects. Certainly in circumstances such as these it would be totally inappropriate to reimpose the stay retroactively.

As of the date of the Bank's set off there was in fact no Chapter 13 case pending. The Bank had full right and authority under state law to take the action which it took and the Court's order reinstating the Debtor's case May 3, 1990, was intended and shall be construed only to constitute a finding that she should be given an opportunity to proceed with the Chapter 13 case from that date forward should she so desire without the necessity of preparing and filing a new petition and schedules and paying an additional filing fee.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor's Motion seeking use of cash collateral and seeking an order requiring First Federal to return the funds set off is denied.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 4<sup>th</sup> day of June, 1990.