

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33871

STEPHEN W. DuPUY

Debtor

**MEMORANDUM ON MOTION TO CONTINUE OR
ALTERNATIVELY TO STAY PROCEEDINGS**

APPEARANCES: Stephen W. DuPuy
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Pro se

GWENDOLYN M. KERNEY, ESQ.
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Chapter 13 Trustee

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

The court has before it the Debtor's Motion to Continue or Alternatively to Stay Proceedings (Motion) filed on November 14, 2001. The Debtor, who is on active duty with the United States Air Force through February 17, 2002, as a member of the Air National Guard, seeks a stay of all proceedings pursuant to § 521 of the Soldiers' and Sailors' Civil Relief Act of 1940 (the Act). The Debtor's Motion is contested by the Chapter 13 Trustee, Gwendolyn M. Kerney, and by a secured creditor, Bank First National, who have each filed briefs in support of their opposition.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) (West 1993).

I

The Debtor, acting *pro se*, filed a Voluntary Chapter 13 Petition on August 9, 2001. He subsequently filed his Chapter 13 Plan on August 31, 2001.¹ A confirmation hearing was set for November 21, 2001, on objections to confirmation filed by Bank First National and the Chapter 13 Trustee, Gwendolyn M. Kerney, and on the Chapter 13 Trustee's "Motion to Convert to Chapter 7; or alternatively Motion to Dismiss with Prejudice." That hearing, which the Debtor stated he was unable to attend due to his military duties, was continued pending resolution of the present Motion.

¹ The Debtor is not unfamiliar with Chapter 13. He has two prior cases, No. 99-34073 filed October 5, 1999, and No. 99-34753 filed November 19, 1999, both of which he also filed *pro se*. The first case, No. 99-34073, was voluntarily dismissed by the Debtor on November 8, 1999. The second case, No. 99-34753, was dismissed on October 11, 2000, upon motion of the Chapter 13 Trustee for the Debtor's failure to comply with the provisions of his confirmed plan. After filing case No. 99-34753, the Debtor did employ counsel. That counsel was, however, subsequently allowed by the court to withdraw.

The Debtor states that he is attempting to employ counsel to represent him at the confirmation hearing because he “does not fully understand nor does he want to attempt to defend without counsel the issues scheduled for trial[.]” He states that he has met with at least two attorneys but is yet to find counsel willing to represent him at a price that he is willing to pay. The court has little sympathy for this argument because of the Debtor’s familiarity with Chapter 13.² He knew the procedural requirements underlying Chapter 13 of the Bankruptcy Code when he commenced the present case. Furthermore, he is also aware that attorney’s fees in Chapter 13 cases are fixed by the court and are paid as administrative expense claims through the confirmed plan. While the Debtor is free to employ an attorney of his choosing, it is the prerogative of the court to determine the reasonable compensation to be paid that attorney.

Claiming that his military duty materially affects his ability to appear before the court and to obtain counsel, the Debtor asks the court to stay all proceedings in this case either until he retains counsel or until April 17, 2002.³ Nonetheless, although the Debtor states in his Motion his lack of availability to attend the confirmation hearing originally scheduled for November 21, 2001, he states that “a continuance until sometime in early December is possible to accommodate, as a leave of absence can then be taken.” Additionally, in a Supplemental Memorandum in Support of Debtors [sic] Motion to Continue and or Alternatively Stay Proceedings filed November 20,

² See *supra* n.1.

³ The Debtor incorrectly states that April 17, 2002, is sixty days after the scheduled conclusion of his military service and that this deadline is applicable pursuant to § 521 of the Act. The sixty-day period actually concludes on April 18, 2002, not April 17. Moreover, the time period set by § 521 does not establish the length of time in which a stay may remain in effect, but rather limits when a stay may be granted. See 50 App. U.S.C.A. § 521 (West 1990). Stays granted under the Act may in fact extend for up to three months after the conclusion of the applicant’s military service. See 50 App. U.S.C.A. § 524 (West 1990).

2001, the Debtor states that he “moves for . . . a rescheduling of the trial . . . perhaps within the next week or two [after the first week in December].”

II

The legislative purpose behind the Soldiers’ and Sailors’ Civil Relief Act is set out at 50 App. U.S.C.A. § 510 (West 1990):

In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act [sections 501 to 591 of this Appendix] remains in force.

The Act should be liberally construed but should not be used “as a sword against persons with legitimate claims.” *Engstrom v. First Nat’l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995); accord *Boone v. Lightner*, 63 S. Ct. 1223, 1231 (1943) (“But in some few cases 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.”).

The Soldiers’ and Sailors’ Civil Relief Act extends to “any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant[.]” 50 App. U.S.C.A. § 521. Despite its use of the labels “plaintiff” and “defendant,” the Act is available to debtors in bankruptcy. See *In re Burrell*, 230 B.R. 309, 312 n.1 (Bankr. E.D. Tex. 1999); *In re Ladner*, 156 B.R. 664, 665-66 (Bankr. D. Colo. 1993).

Upon request by a “person in military service,”⁴ a proceeding must be stayed “unless, in the opinion of the court, [the applicant’s ability to proceed] is not materially affected by reason of his military service.” 50 App. U.S.C.A. § 521. Thus, a stay is not warranted solely by a “mere showing” of military service. See *Boone*, 63 S. Ct. at 1226. Instead, “[u]nless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the Act is inapplicable.” *Royster v. Lederle*, 128 F.2d 197, 199 (6th Cir. 1942).

Where “a serviceman [does] not exercise due diligence in attempting to make himself available for trial,” the court may conclude that military service has not “materially affected” the movant’s ability to proceed. See *Hackman v. Postel*, 675 F. Supp. 1132, 1134 (N.D. Ill. 1988). Similarly, courts have declined to stay proceedings in cases of bad faith or where the movant “had not diligently pursued the action when he had the opportunity to do so.” See *TIC Fed. Credit Union v. Diaz (In re Diaz)*, 82 B.R. 162, 164-65 (Bankr. M.D. Ga. 1988) (collecting cases).

The Act does not assign a burden of proof. See *Boone*, 63 S. Ct. at 1228-29. Courts should therefore employ their “sound sense” to determine who they may “ask to come forward with facts needful to a fair judgment.” *Id.*

⁴ “Person in military service” is a defined term under the Act and includes persons in active duty service with the Air Force, including reservists. See 50 App. U.S.C.A. §§ 511, 516 (West Supp. 2001).

III

Keeping in mind that the Act must be liberally construed in favor of military personnel, the court must decide whether the Debtor is "materially affected by reason of his military service." 50 App. U.S.C.A. § 521. If granted, the stay need not be identical in length or scope to that requested by the applicant. See 50 App. U.S.C.A. § 521 (The stay, if granted, shall be "as provided in this Act[.]""); 50 App. U.S.C.A. § 524 ("Any stay . . . may . . . be ordered for the period of military service and three months thereafter *or any part of such period*, and subject to such terms as may be just[.]" (emphasis added)).

The court finds that the Debtor's ability to proceed with a confirmation hearing is not "materially affected" by his military service. In reaching this decision, the court notes that the Debtor is merely "out of state." He is not in Somalia as was the *Ladner* debtor. See 156 B.R. at 665. Furthermore, the Chapter 13 Trustee submitted with her Brief of Chapter 13 Trustee in Opposition to Debtor's Motions for Stay of Bankruptcy Proceedings Under the Soliders [sic] and Sailors Civil Relief Act filed December 10, 2001, envelopes from four mailings received from the Debtor, each bearing a Knoxville, Tennessee postmark. The letters were mailed on September 25, 2001, a Tuesday; October 22, 2001, a Monday; October 25, 2001, a Thursday; and November 19, 2001, a Monday. Clearly, the Debtor was not with his Air National Guard unit on the days he posted these mailings.

More persuasive in the court's decision are the Debtor's statements in his Motion to Continue or Alternatively to Stay Proceedings filed November 14, 2001, and in his Supplemental

Memorandum in Support of Debtors [sic] Motion to Continue and or Alternatively Stay Proceedings filed November 20, 2001, that he can take a leave of absence and be available for trial in early or mid-December.

In summary, the court will not stay further proceedings in the Debtor's Chapter 13 case. A confirmation hearing will be set for January 23, 2002, at which time the Debtor, with or without counsel, will appear. The court will conduct an evidentiary hearing and, upon consideration of the objections to confirmation filed by the Chapter 13 Trustee and Bank First National, will determine whether the Debtor can obtain confirmation of his Chapter 13 Plan. If the Debtor fails to appear, his case will be dismissed.

The court is required to address one final matter. The Debtor's initial Chapter 13 Plan was filed on August 31, 2001. Thereafter, by documents entitled "Amended Motion to Amend and or Modify Chapter 13 Plan" and "Motion to Amend the Debtor's Summary Statement Filed On or About the 12th Day of December 2001," filed on December 12 and 13, 2001, respectively, the Debtor purported to amend his original Chapter 13 Plan by changing the length of his plan and the treatment originally proposed for unsecured and certain secured creditors. The plan, as now modified, is confusing and may cause creditors difficulty in its interpretation. The court will accordingly direct that the Debtor, within fourteen days, file on the Chapter 13 plan form utilized by the Chapter 13 Trustee in this division, a second amended plan clearly defining the plan the Debtor seeks to have confirmed. Upon receipt of the modified plan, the clerk will be directed to serve a copy on all parties in interest and will notify them of their opportunity to object to confirmation and to appear at the January 23, 2002 confirmation hearing. In the event the Debtor

fails to file a modified plan, the court will proceed with the scheduled confirmation hearing but anticipates that confirmation will be denied and the case will either be dismissed or converted to Chapter 7 on the Trustee's Motion.

An order consistent with this Memorandum will be entered.

FILED: December 20, 2001

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33871

STEPHEN W. DuPUY

Debtor

ORDER

For the reasons stated in the Memorandum on Motion to Continue or Alternatively to Stay Proceedings filed this date, the court directs the following:

1. The Debtor's Motion to Continue or Alternatively to Stay Proceedings filed on November 14, 2001, is DENIED.

2. The hearing on confirmation of the Debtor's Chapter 13 Plan filed August 31, 2001, as modified on December 12 and 13, 2001, on the objections to confirmation filed by Bank First National, a Division of The First National Bank of Zanesville, and the Chapter 13 Trustee, Gwendolyn M. Kerney, and on the Motion to Convert to Chapter 7; or [A]lternatively Motion to Dismiss With Prejudice filed by the Chapter 13 Trustee, Gwendolyn M. Kerney, will be held on January 23, 2002, at 1:30 p.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee. The issues identified by the court in paragraph 3 of the October 24, 2001 scheduling Order will, unless modified by the parties, continue to govern the confirmation hearing. Upon the Debtor's failure to appear, his Chapter 13 case will be dismissed without further notice or hearing.

3. The Debtor, by January 3, 2002, utilizing the Chapter 13 plan form adopted by the Chapter 13 Trustee in the court's Northern and Northeastern Divisions, will file a modified plan incorporating his

original Chapter 13 Plan filed August 31, 2001, and all subsequent amendments into a single document.

4. Upon the Debtor's filing of his modified Chapter 13 plan pursuant to paragraph 3 above, the clerk will serve a copy of the plan on the Chapter 13 Trustee, the United States Attorney, Bank First National, a Division of The First National Bank of Zanesville, and all parties in interest together with a notice of their opportunity to file objections to their treatment under the modified plan and of their right to appear and be heard at the January 23, 2002 confirmation hearing. Objections previously filed need not be refiled.

5. The Motion to Convert to Chapter 7; or [A]lternatively Motion to Dismiss With Prejudice filed by the Chapter 13 Trustee, Gwendolyn M. Kerney, will also be heard on January 23, 2002, at 1:30 p.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee.

SO ORDERED.

ENTER: December 20, 2001

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE