UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

CASE NO. 91-22749

MARK D. HULL,

Debtor.

BACKGROUND

On October 18, 1991 the Debtor, Mark D. Hull (the "Debtor"), filed a petition initiating a Chapter 13 case.

The Debtor's schedules showed that: (1) he owned five parcels of real property with a total value of $530,000; (2) four of the parcels he owned were secured by liens which totalled approximately $193,000; (3) one of the parcels he owned was 59 Park Avenue, Rochester, New York ("Park Avenue"), valued at $250,000, which was subject to a mortgage in favor of Bernard Oseroff ("Oseroff") in the approximate amount of $132,000 (the "Oseroff Mortgage"); (4) there were in excess of $29,000 in unpaid real estate taxes due for Park Avenue; and (5) on or about February 20, 1991, a Judgment of Foreclosure and Sale had been entered in a state court action commenced to foreclose the Oseroff Mortgage.

The Debtor's schedules also showed that the Debtor: (1) was the sole shareholder of Andorich, Inc. ("Andorich"), which owned three parcels of real property valued at $480,000, including 3331 West Lake Road ("West Lake Road"), valued at $315,000, where the Debtor resided; (2) was the sole shareholder of Richreif, Inc. ("Richreif"), which owned three parcels of real property valued at $117,500; (3) had a stock portfolio valued at approximately $84,000; and (4) was the holder of a mortgage receivable with a face value of $85,000.

In addition to secured debt of $202,960, which included a mortgage on West Lake Road, the Debtor scheduled priority claims for real estate taxes and building code violations of $39,370.35, and four unsecured creditors with a total indebtedness of $15,219.57.

With his schedules, the Debtor filed a budget (the "Budget") and a Chapter 13 Plan (the "Plan"). The Budget showed total monthly income of $8,858.33, representing income from real estate of $8,650.00 and interest and dividend income of $208.33, and monthly expenses of $5,431.07, leaving projected excess monthly income of $3,427.26. The Plan proposed to pay $3400 per month to the Chapter 13 Trustee (the "Trustee") over the sixty month term of the Plan and provided for the arrearages on the West Lake Road mortgage of approximately $9895, the priority secured claims for real estate taxes of approximately $31,000, the Oseroff Mortgage of approximately $155,000 and the claims of all unsecured creditors to be paid in full over the term of the Plan.

At a hearing on December 18, 1991, now retired Judge Edward D. Hayes confirmed the Plan with an addendum. The addendum, negotiated by Oseroff, provided that the Debtor, in addition to making the regular monthly Plan payments of $3400, was required to sell real estate or otherwise pay into the Plan an additional $36,000 within two years of confirmation, and upon his failure to do so, the automatic stay would be modified to permit Oseroff to continue his pending mortgage foreclosure proceeding.

On February 14, 1994, the Trustee filed a Motion pursuant to Section 1307(c) to dismiss the Debtor's Chapter 13 case because of the Debtor's failure to make the $36,000 lump sum payment within two years of confirmation and because there were $13,600 in monthly Plan payment arrearages. The Trustee's Motion to Dismiss was originally returnable on February 28, 1994 but was adjourned by consent on the return date to March 28, 1994.

On March 2, 1994, a proof of claim was filed in favor of Mary Marrese in the amount of $120,017.59, an amount alleged to be due to her from the Debtor for loans made to the Debtor, Andorich, Stevemar, Inc. ("Stevemar" -- another corporation solely owned by the Debtor) and Richreif of over $125,000. On the same date, March 2, 1994, a proof of claim was filed on behalf

of Armand Marrese in the amount of $37,247.50, an amount alleged to be due to him from the Debtor for loans made to the Debtor, Andorich, Stevemar, Inc. and Richreif. On the same date, March 2, 1994, a motion originally returnable on March 14, 1994, was filed on behalf of Armand Marrese and Mary Marrese pursuant to Section 1307(c) to convert the Debtor's case to a Chapter 7 case (the "Conversion Motion").

The Conversion Motion indicated that: (1) the claims held by the Marreses existed on the date of the filing of the petition on October 4, 1991 but that the Debtor had purposely failed to list the Marreses as unsecured creditors; (2) in February, 1991, the Marreses, unaware of the Debtor's Chapter 13 case, had commenced an action in Monroe County Supreme Court against the Debtor (the "State Court Action") and on April 8, 1993 a default judgment had been entered against the Debtor which fixed liability but provided for a further hearing to be held to fix the amount of damages; (3) the Debtor had moved in the State Court Action to vacate the default judgment, the relief requested by the Debtor had been denied, and on or about November 19, 1993 the Appellate Division, Fourth Department, of New York State Supreme Court had affirmed the entry of the default judgment and the denial of the motion to vacate the judgment; and (4) there were a number of real and personal property assets which the Debtor had failed to list in his bankruptcy. The Conversion Motion had attached as an exhibit a copy of the Amended Complaint in the State Court Action which alleged that both Armand Marrese and Mary Marrese are considered disabled by the Social Security Administration and are receiving benefits; each have a mental illness which makes them vulnerable and easily manipulated and influenced; Mary Marrese suffers from and has been treated for severe depression and in the past ten years has been hospitalized at the Rochester Psychiatric Center, Strong Memorial Hospital and Genesee Hospital; the funds borrowed by the Debtor and his corporations were the Marreses' investments and life savings, saved at a time when they were still able to work and receive wages; and the Debtor functioned as the financial adviser

and confidant for the Marreses during this period.

The Conversion Motion requested that the Debtor's case be converted to a Chapter 7 case on the grounds that: (1) the Debtor would never have been eligible for relief in Chapter 13 by reason of Section 109(e)[1] if he had properly listed the Marreses as unsecured creditors; (2) the Marreses needed the Court's assistance in liquidating the Debtor's assets; and (3) it would be in the best interests of all of the creditors of the Debtor if his case was converted to Chapter 7.

On March 3, 1994, the Debtor filed a motion (the "Dismissal Motion") pursuant to Section 1307(b), originally returnable on March 28, 1994, requesting that his Chapter 13 case be dismissed.

On March 10, 1994, the Debtor filed a Cross-Motion (the "Cross-Motion") opposing the Conversion Motion and requesting that: (1) the Debtor be allowed to dismiss his Chapter 13 case; (2) the Marreses and their attorney be held to have willfully violated the automatic stay provided by Section 362 by their commencement and continuation of the State Court Action; and (3) the decisions made, orders entered and judgments taken in the State Court Action be declared to be void as having been in violation of the automatic stay.

The Cross-Motion alleged that: (1) the Dismissal Motion had been prepared and discussed with the Trustee prior to the filing of the Conversion Motion; (2) Section 1307(b) gives the Debtor an absolute right to dismiss or withdraw his petition at any time before the case is closed; (3) the

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[1] Section 109(e) provides:

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and non-contingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

claims of Armand and Mary Marrese are and were at the time of the petition contingent and unliquidated, so that even if the claims had been listed by the Debtor at the time of the filing of his petition, the Debtor would have been eligible for relief pursuant to Section 109(e) until the Marrese claims, if they were liquidated, were found to be in an amount in excess of $85,000; (4) the Debtor had a number of defenses to the claims of Armand and Mary Marrese in the State Court Action, including Statute of Frauds and Statute of Limitations defenses; (5) the damage assessment hearing was scheduled for May, 1994; (6) the attorney for the Marreses knew about the Debtor's Chapter 13 case shortly after the commencement of the State Court Action, since Janice Lahman ("Lahman"), a friend of the Debtor's (who is also an attorney), contacted the attorney for the Marreses and advised her that the Debtor had filed a Chapter 13 case; (7) the Marreses had failed to move within the time provided by Section 1330 of the Bankruptcy Code to have the Debtor's Confirmation Order vacated for fraud; (8) the actions of the Marreses and their attorney in continuing the State Court Action after notice of the Chapter 13 case to obtain a default judgment, preliminary injunction, the entry of a lis pendens, the defending of an appeal at the Appellate Division and the setting down of a damage hearing were clear and willful violations of the automatic stay; and (9) such actions in the State Court Action should be declared void and the Debtor should be awarded a judgement in an amount equal to the fees and expenses which he incurred in connection with the State Court Action pursuant to Section 363(h).

On April 26, 1994, the Marreses filed a motion for relief from the automatic stay (the "Stay Motion") to be allowed to continue with the damage hearing scheduled to be conducted in the State Court Action on May 18, 1994, a date prior to the May 23, 1994 evidentiary hearing scheduled by this Court to hear the pending Conversion, Dismissal and Cross-Motions. The Court granted the relief requested in the Stay Motion with the provision that no actual judgment be entered in the State Court Action as a result of the damage hearing until an order was entered with this Court's decision

on the pending motions.

On May 23, 1994, the Court conducted an evidentiary hearing on the various motions at which the following witnesses testified: (1) Robert Wood, Esq., the Debtor's attorney in the State Court Action; (2) the Debtor, Mark Hull; (3) Janice Lahman, Esq.; (4) Irene Dymkar, the attorney for Armand and Mary Marrese; (5) Michael Arnold, the attorney who originally represented the Debtor in his Chapter 13 case prior to the filing of a Substitution of Attorney on March 3, 1994; and (6) Armand Marrese.

DISCUSSION

I. Debtor's Absolute Right to Dismiss Pursuant to Section 1307(b) in the Face of a Motion to Convert Pursuant to Section 1307(c)

Section 1307 provides for the conversion or dismissal of a Chapter 13 case.[2] Section 1307(b)

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[2] Section 1307 provides:

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including–

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and denial of

appears to require the court to dismiss a case not previously converted from another chapter upon the request of a debtor at any time since the language of the section states "the court shall dismiss a case under this chapter" (emphasis added). The legislative history with respect to Section 1307(b) indicates a strong policy for Chapter 13 to be a voluntary chapter, designed to encourage debtors to, among other things, pay their creditors in a three to five year plan more than the creditors would receive in a Chapter 7 liquidation, and thus a debtor should be allowed to dismiss his voluntary Chapter 13 bankruptcy case upon request. Section 1307(c), on the other hand, permits a court, in its discretion and on the request of a party in interest, to convert or dismiss a Chapter 13 case if there is cause, whichever is in the best interest of creditors.

A number of bankruptcy courts have addressed the question of whether a debtor is entitled to exercise what appears to be this absolute right to have a case dismissed under Section 1307(b) after a Section 1307(c) motion to convert the case to Chapter 7 has been brought. Many of these courts have held that a debtor does not have an absolute right to a dismissal under Section 1307(b) if the case was filed for an improper purpose, in bad faith, or constituted an abuse or misuse of the

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confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

(d) Except as provided in subsection (e) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 or 12 of this title.

(e) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

bankruptcy process.[3]

From the pleadings and proceedings in this case, including the testimony and evidence presented at the evidentiary hearing on May 23, 1994, it is clear that: (1) the Debtor was fully aware of the claims of Armand and Mary Marrese against him and his corporations at the time of the filing of his petition, the proposal of the Plan and the confirmation of the Plan, but he purposely failed to list the Marreses as creditors on his schedules or provide for them in the Plan; (2) the Debtor's Chapter 13 case was filed primarily to hold off Oseroff and a foreclosure sale of Park Avenue scheduled for October, 1991 and to use the provisions of the Bankruptcy Code to deal with Oseroff and not in good faith and with fundamental fairness deal with all of his financial affairs in a comprehensive manner, including the Marrese claims; (3) even when the Marreses commenced the State Court Action, the Debtor and his representatives made no attempt to amend the Debtor's schedules, otherwise make the Court aware of the Marrese matters, or request that the Confirmation Order be vacated and that the Debtor be allowed to propose a new plan in Chapter 13 or Chapter 11 which would deal with the Marrese claims, rather, the Debtor and his representatives continued to litigate the Marrese matters in the State Court Action until the last possible moment when a damage hearing was scheduled and the Marreses made a motion to convert the Debtor's Chapter 13 case; (4) the Debtor had previously been in bankruptcy and each of his solely owned corporations, Andorich, Stevemar and Richreif, had previously filed Chapter 11 cases, so that the Debtor knew his obligation to list all creditors, what the nature and effect of the automatic stay was on creditors as well as what could be accomplished to hold off certain creditors under a confirmed plan; (5) the testimony of the Debtor as to why he did not list the Marreses was totally inconsistent and not credible and, given the Debtor's level of business sophistication, experience in bankruptcy matters and knowledge of the

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[3] *E.g., In re Zarowitz*, 36 B.R. 906, 908 (Bankr. S.D.N.Y. 1984).

seriousness of the allegations before the Court, exhibited a total lack of respect for the Bankruptcy Code and the Bankruptcy System;[4] (6) the Debtor admitted that he had not listed a Steinway piano valued at approximately $13,000 on his schedules.[5]

For the foregoing reasons which indicate bad faith and an intentional abuse of the Bankruptcy System by the Debtor, the Court finds that the Debtor does not have an absolute right to dismiss his case pursuant to Section 1307(b) in the face of a previously filed motion to convert pursuant to Section 1307(c).

II. Conversion or Dismissal - Whichever is in the Best Interests of Creditors

Section 1307(c) permits the Court to convert or dismiss a Chapter 13 case for cause, whichever is in the best interests of creditors.

A. Cause

Based on the facts and circumstances presented in this case, the Court finds that sufficient cause has been established within the meaning and intent of Section 1307(c) to convert the Debtor's case to a Chapter 7 case in the event that the Court determines, in its discretion, that conversion rather than dismissal would be in the best interests of creditors. In this case, the Debtor: (1) has

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[4] The testimony and evidence presented was that the Debtor believed that he had and would take care of the Marreses, because he had essentially pledged to them his stock account and was prepared to give them a mortgage on property located on Lyell Avenue owned by Andorich. Such testimony is totally inconsistent with the Debtor listing his stock account and not indicating that it was otherwise pledged or liened to the Marreses. Further, the Debtor admitted at the hearing that the Marreses were owed in excess of $100,000 in October of 1991, and at least some part of that was owed individually by the Debtor. The Debtor further testified that he had not listed a 39 Silver Street mortgage receivable, because he intended to give that to the Marreses as additional security. The Debtor also admitted that he had intended to deal with the Marreses once he took care of Oseroff through the Chapter 13 case, so he did not list them.

[5] Although the Debtor did list assets on his schedules which indicated substantial equity over the amount necessary to pay creditors, the failure to list significant real and personal property is inexcusable and indicates fundamental bad faith and an intentional fraud upon the Court especially when there is a debtor of this sophistication and knowledge of bankruptcy proceedings.

purposely failed to schedule known creditors with significant claims; (2) has failed to disclose significant real and personal property on his schedules; (3) has failed to take the necessary steps to comply with the order of confirmation by liquidating such assets as would allow him to make the $36,000 lump sum payment required to be made within two years of confirmation; (4) has failed to make the monthly payments to the Trustee required by the Order of Confirmation; (5) has failed to keep post-petition real estate taxes current on Park Avenue and other properties; (6) has failed to amend his schedules or otherwise advise the Court of the pending State Court Action; (7) has proposed and had confirmed a Plan which was designed to deal with only some but not all of his creditors and financial affairs and allow him to pick and choose the creditors and particular financial problems which he desired the Court and the Bankruptcy System to assist him in dealing with, while leaving him able to continue to deal, as he pleased, with other creditors in a way which has proved to be with less than fundamental fairness and good faith. For all of these reasons, the Court determines that there is sufficient cause to convert the Debtor's case to a Chapter 7 case.

B. Conversion or Dismissal - The Best Interests of Creditors

By the completion of the evidentiary hearing, the Marreses were joined by the Trustee, Oseroff and two of the Debtor's four unsecured creditors in requesting that the Debtor's case be converted to a Chapter 7 case. Anthony Corona, who holds an outstanding mortgage of approximately $16,000, secured by property valued at $125,000 with unpaid taxes due of approximately $10,000, appeared at the evidentiary hearing by his attorney but took no position with respect to conversion or dismissal.

The Debtor, in asserting that dismissal would be in the best interests of creditors, filed a proposal (Debtor's Ex. 1) for the payment of his creditors in the event of a dismissal (the "Payment Plan"). The Payment Plan proposed: (1) a liquidation of the Debtor's security account; (2) a refinancing of West Lake Road; (3) obtaining an equity loan on property known as 116 Whitney

Street, not previously scheduled by the Debtor; (4) the use of the proceeds of the refinancing and the equity loan to pay delinquent real estate taxes on Park Avenue, approximately $43,500 to the Marreses, the $36,000 lump sum payment due under the Plan which would be paid to Oseroff, who would then receive $2500 per month to retire the balance of the Oseroff debt, with any excess proceeds to be applied to the Corona Mortgage; and (5) the balances of all claims to be paid over time by monthly payments, including a monthly minimum payment of $8000 to the Marreses to be secured by acceptable property.

It is clear that the Debtor's Payment Plan would simply further delay creditors from being paid within a reasonable period of time and would afford and keep available for the Debtor all possible options to allow him, if possible, to realize the maximum possible equity from his assets to the detriment of his creditors, a pattern of conduct which the Debtor has exhibited over the past eleven years. Although this conduct is not criminal, it clearly shows a lack of fundamental fairness and good faith by the Debtor in dealing with his creditors. Therefore, I conclude that a dismissal of this case will only result in the creditors of the Debtor being further delayed, at considerable additional expense, in their efforts to be paid the indebtedness which they are owed. For the foregoing reasons, the Court, in its discretion, finds that it would be in the best interests of creditors and of the Bankruptcy System for this case to be converted to Chapter 7.

III. Willful Violation of the Automatic Stay

Clearly, by reason of the provisions of Section 362, there was an automatic stay in effect preventing actions to collect the pre-petition debts owed by the Debtor to Armand and Mary Marrese, even though these debts were not scheduled by the Debtor or provided for in the confirmed Plan. This was true even post-confirmation in February, 1991 when the State Court Action was commenced. However, from the evidence presented at the evidentiary hearing it is clear that neither the Marreses nor their attorney were aware of the pending Chapter 13 case at the time of the

commencement of the State Court Action, since the Marreses were not scheduled as creditors, received no notice from the Bankruptcy Court, and did not otherwise have actual knowledge of the Chapter 13 case. Therefore, the commencement of the State Court Action was not a willful violation of the automatic stay.

It is also clear, however, that subsequent to the commencement of the State Court Action, the attorney for the Marreses was advised by Janice Lahman, an attorney who admitted to the attorney for the Marreses that she was only a friend of the Debtor's and did not represent him in either his pending Chapter 13 case or in the State Court Action, that the Debtor had filed a Chapter 13 case.

As is so often the case, from that point on it is clear that the attorney for the Marreses, who did not fully understand that the automatic stay applied under the facts and circumstances presented, since the Marreses were not listed in and notified by the Court of the bankruptcy, reasonably expected further confirmation from the Debtor, his bankruptcy attorney, or the attorney representing him in the State Court Action that in fact the Debtor had filed a Chapter 13 case and that there was a stay in effect that applied to the pending State Court Action. The attorney for the Marreses indicated at the Evidentiary Hearing that she expected that the Debtor would plead the existence of the stay in the State Court Action and then take appropriate steps to deal with the Marrese claims in any pending bankruptcy. When the attorney for the Marreses received no such confirmation, received no answer setting forth an affirmative defense that there was a pending bankruptcy and an automatic stay, saw that no appearance was made at the preliminary hearing conducted in the State Court Action, saw that no attempts were being made by the Debtor or his representatives to deal with the Marrese claims in his allegedly filed bankruptcy case, and saw actions being taken only in the State Court Action, the attorney continued with the State Court Action, including the entry of a default judgment, the defense of a Motion to Vacate the Default Judgment filed by the Debtor and

the defense of an appeal of the denial of the Motion to Vacate the Default Judgment filed by the Debtor, with a final determination being made on the appeal in November of 1993.

Although it appears that negotiations for the settlement of the State Court Action were conducted, no settlement was finalized and still no attempt was ever made by the Debtor or his representatives to deal with the Marrese claims or the State Court Action in the Bankruptcy Court before the Conversion Motion was filed.

Many courts, including the Court of Appeals for the Second Circuit, have held that actions taken in violation of the automatic stay of Section 362 are void and without effect. *See In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied,* 485 U.S. 1035 (1988); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984). However, Section 362(d) expressly grants bankruptcy courts the option, in fashioning appropriate relief, of "annulling" the automatic stay in addition to "terminating" it. "The word `annulling' in this provision evidently contemplates the power of bankruptcy courts to grant relief from the stay which has retroactive effect; otherwise its inclusion, next to `terminating', would be superfluous." *Albany Partners*, 749 F.2d at 675. The Bankruptcy Code, therefore, grants bankruptcy judges the equitable discretion to annul the automatic stay "for cause" under Section 362(d). *See In re Calder* 907 F.2d 953, 956 (10th Cir. 1990); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *In re Atlantic Ambulance Associates, Inc.*, 166 B.R. 613, 615 (Bankr. E.D.Va. 1994). The principles of equity support granting annulment of or retroactive relief from the automatic stay whenever a creditor did not have actual knowledge of the applicability of the automatic stay and the creditor would be unfairly prejudiced if the debtor could raise the stay as a defense. *See Calder* 907 F.2d at 956.

From all of the facts and circumstances of this case, including the way in which the Debtor and his representatives dealt with the State Court Action and purposely failed to deal with the Marrese claims in any way in this Court, and the prejudice which would result to the Marreses,

including the costs and expenses which they incurred to continue with the State Court Action in the face of the Debtors' actions and omissions, if the actions taken in the State Court Action were now determined to be void, the Court believes that there is a sufficient equitable basis for it to find that the Debtor has waived any benefit of the automatic stay as to the Marrese claims and the State Court Action. Further, the Court, in the exercise of its discretion and equitable powers, finds that there are extraordinary circumstances presented in this case and therefore cause exists to annul the automatic stay effective as of January 28, 1991 when the Order of Confirmation was entered as to the actions taken on behalf of the Marreses in the State Court Action, and the stay is so annulled. By this time, the Debtor had still failed to schedule the Marreses or otherwise provide for them in the Plan and had still failed to schedule significant real and personal property which are assets of the estate.

The Debtor's actions and omissions are so egregious in this bankruptcy case and in the State Court Action that it would be inequitable for the Court to determine, as to the Debtor, that there has been a willful violation of the automatic stay.

The automatic stay provided by Section 362 is primarily designed to allow the debtor and the estate a stay of all proceedings so that there can be an orderly administration of the estate. To some extent, however, the stay also inures to the benefit of other creditors to insure among other things that their right to share in an equitable distribution of the Debtor's assets is not prejudiced. Although as to the Marreses the Debtor may have effectively waived the benefits of the automatic stay, it would be inequitable for the actions taken in the State Court Action to negatively impact on the rights and remedies of the Debtor's other creditors, especially those who participated in and were bound by the Chapter 13 case and the Order of Confirmation. At this time, the State Court Action has not resulted in a final lien on the assets of the Debtor in favor of the Marreses which would prejudice the rights and interests of the Debtor's other creditors. Certainly, this Court could have modified the automatic stay in connection with the Marrese claims, if it had been requested to, to

allow the State Court Action to proceed as a means of liquidating the Marrese claims to determine whether the Debtor was still eligible to remain in Chapter 13 pursuant to Section 109(e) or otherwise to fix the amount of the claims. At this point, because of the restrictions that this Court has placed on the entry of any final judgment in the State Court Action, that Action has in fact served only to liquidate the Marrese claims. Therefore, the Court, in the exercise of its discretion and equitable powers, finds that cause exists to annul the automatic stay effective as of January 28, 1991 as to the State Court Action to the extent that the decisions, orders and judgments in that Action do not result in any unsubordinated lien against the Debtor's property during the pendency of the converted Chapter 7 case, and the stay is so annulled. Any lis pendens or other lien entered in or existing as a result of the State Court Action is subordinated to the claims of all creditors in the Chapter 7 case and to the rights of the Trustee to marshal and liquidate the Debtor's assets during the pendency of the converted Chapter 7 case.

CONCLUSION

The Debtor's case is converted to a case under Chapter 7. The Debtor's requests that any and all actions, liens, decisions or judgments in the State Court Action be declared void and the Debtor have a judgment for damages for a wilful violation of the automatic stay pursuant to Section 363(h) are in all respects denied except that any lien as a result of the State Court Action shall be subordinate to the claims of the Debtor's creditors and the rights and remedies of the Trustee to marshal and liquidate the Debtor's assets in the pending Chapter 7 case for as long as such case is pending.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: July 8, 1994