

**FILED**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

JAN 24 2005

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

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4 In re: ) Chapter 13  
5 ROBERT T. ARROWSMITH, )  
6 ) No. 2:04-bk-19153-JMM  
7 ) **MEMORANDUM DECISION RE: MOTION**  
8 ) **FOR RELIEF FROM THE AUTOMATIC STAY**  
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On January 13, 2005, a final hearing was held on American Pension Services', FUB Custodian for Edward Shiffra ("APS") Motion for Relief from Stay. After reviewing the pleadings and the entire file, the court now rules.

**FACTS**

On March 12, 2002, Robert Arrowsmith ("Debtor") dba Farwest Marketing filed a chapter 11 bankruptcy petition (Case No. 2:02-bk-03610).

On May 27, 2003, Debtor and his non-debtor spouse granted APS a second lien on their residence (the "property"). On October 27, 2003, Debtor granted APS a fourth lien on his property; on October 30, 2003, a fifth lien on his property; and on December 23, 2003, a sixth lien on his property.

On February 24, 2004, Debtor's chapter 11 was converted to a chapter 7. On April 13, 2004, APS filed a Motion to Lift the Stay in Debtor's chapter 7 bankruptcy case. On June 17, 2004, Judge George B. Nielsen signed an Order for Relief from the Automatic Stay. Debtor was granted a chapter 7 discharge on June 25, 2004.

Four months later, on November 1, 2004, Debtor filed a chapter 13 bankruptcy petition. On November 9, 2004, APS filed the instant Motion for Relief from Stay. A preliminary

1 hearing was held on December 14, 2004 but was continued to a final hearing due to improper notice.  
2 A final hearing was held on January 13, 2005. This court took the matter under advisement.

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4 ISSUE

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6 Whether the Order Granting Relief from the Automatic Stay on Debtor's property in  
7 his previous chapter 7 bankruptcy is res judicata in his current chapter 13 bankruptcy?

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9 DISCUSSION RES JUDICATA

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11 "Res judicata precludes a defendant from raising, in a second action, defenses that  
12 would have been equally available to her in a prior action." *In re Bradley*, 38 B.R. 425, 429 (Bankr.  
13 C.D.Cal. 1984) citing C. Wright, A. Miller and E. Cooper, FEDERAL PRACTICE AND PROCEDURE §  
14 4414 (1981). "But there is an important limitation here, and that is this: the defense, in order to be  
15 barred, *must have been available* at the time of the first action. A party cannot be barred by res  
16 judicata from raising defenses that did not exist at the beginning of the case." *Bradley*, 38 B.R. at  
17 429, citing *United States v. Villanueva*, 453 F.Supp 17 (E.D. Wash. 1978).

18 However, whether an order granting relief from the stay in one bankruptcy is res  
19 judicata in a subsequent bankruptcy is an open question in the Ninth Circuit. *See In re Taylor*, 884  
20 F.2d 478, 481 and n.3 (9th Cir. 1989) (criticizing the BAP for making a "sweeping statement" that  
21 such orders lack preclusive effect, but declining to address the issue).

22 In the *Bradley* case, the debtor filed for chapter 13 relief and the creditor obtained  
23 relief from the automatic stay. Before the creditor could foreclose on its lien, the debtor filed a  
24 chapter 7 bankruptcy petition. The California bankruptcy court judge held that the creditor's relief  
25 from stay in the prior proceeding was res judicata in the debtor's current chapter 7 case because there  
26 was no material change of circumstances since the beginning of the case.

1 Here, Debtor filed a chapter 11 bankruptcy petition, which was converted to chapter 7.  
2 The court lifted the stay. Debtor then filed a chapter 13 and now argues that the order lifting the stay  
3 in Debtor's previous chapter 7 should not be given res judicata effect in his current chapter 13.  
4 Because this court agrees with the reasoning in *Bradley*, the question in the instant case becomes  
5 whether Debtor's circumstances have changed so that the order lifting the stay in Debtor's chapter 7  
6 should not apply to Debtor's current chapter 13.

7 Debtor's response to APS' Motion for Relief from Automatic Stay provides no  
8 evidence that Debtor's circumstances have materially changed since his first bankruptcy. Debtor's  
9 response only argues that APS does not hold valid and perfected liens against Debtor's property  
10 because "the maker(s) of the note do not match the signature page." In addition, Debtor filed a  
11 Supplemental Response to the Motion to Lift the Automatic Stay stating that he has filed an adversary  
12 complaint seeking declaratory relief that the Trustee's Sale is invalid and that the secured liens  
13 against the Debtor's property do not include the three Deeds of Trust which were not executed by the  
14 Debtor's spouse. This does not constitute a material change in the circumstances of the Debtor.  
15 These same arguments were raised and rejected in the prior chapter 7.

16 Since Debtor has shown no material change in circumstances since the stay was lifted  
17 in his previous chapter 7 bankruptcy, keeping the automatic stay in effect is not warranted. The  
18 arguments Debtor has advanced are not issues to be addressed in bankruptcy court. Debtor is free to  
19 rehash his issues relating to the validity of the liens, or a claim for damages, in state court.

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### CONCLUSION

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23 Because Debtor has failed to provide evidence of any material changes in his  
24 circumstances since the automatic stay was lifted in his chapter 7 bankruptcy, res judicata effect will  
25 be given to the June 17, 2004 Order Lifting Stay. Therefore, APS' Motion for Relief from the  
26 Automatic Stay is granted.

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A separate order will be entered concurrently with this Memorandum Decision.

DATED: January 24 2005.

  
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JAMES M. MARLAR  
UNITED STATES BANKRUPTCY JUDGE

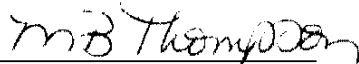
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