FILED
U.S. Bankruptcy Court
W.D.N.C. Asheville, NC
OCT 7 2003
Geraldine Treutelaar
Crockett, Clerk
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UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Asheville Division

In Re:	)	Case No. 03-10603
	)	Chapter 7
KATHLEEN A. SHIPLEY,	)	
	)	
Debtor.	)	
	)	

JUDGMENT ENTERED ON OCT 7 2003

ORDER

This matter is before the court upon the debtor's Motion to Set Aside Order and [for] Sanctions. The court has concluded that the Motion to set aside the prior order should be granted; but that the motion for sanctions should be denied, and that the creditor's motion for relief from stay should be granted.

The debtor filed a Chapter 7 petition on May 19, 2003. At that time, the debtor was in default on a loan from Onyx Acceptance Corporation ("Onyx"), which was secured by a 2001 Ford Econoline Van. Shortly after the debtor filed her petition, Onyx filed a Motion for relief from stay seeking to recover its collateral. Prior to the July 23, 2003, hearing on Onyx Motion for relief from stay, the debtor tendered to Onyx funds sufficient to pay the account current.

Following a continued hearing on Onyx Motion for relief from stay on August 20, 2003, the court improvidently entered an Order Granting Motion for Relief from Stay, as the court was under the impression that the issue was ripe for decision. However, the court docket reflected that the hearing had been continued for further argument. The debtor filed the present Motion to set aside

order seeking to have the court's August 28, 2003, Order rescinded on the basis that the matter had been continued until September 17, 2003, because counsel for Onyx had raised a reaffirmation issue for the first time at the August 20 hearing. Further, the debtor argued that the Order Granting Motion for Relief from Stay had been improperly submitted by counsel for Onyx and asked the court to sanction counsel for Onyx accordingly.

Onyx motion for sanction is DENIED because the August 28, 2003, order was entered by the court (as a result of its own error) rather than submitted by counsel for Onyx. The Order Granting Motion for Relief from Stay was entered prematurely and, therefore, is VACATED. However, after further argument and review, the court has considered the matter anew and decided that its previous determination should stand.

At the hearing on the debtor's Motion to Set Aside Order and [for] Sanctions, the debtor argued that because she became current on the Onyx loan before the discharge was entered on August 28, 2003, she was deemed current and should be able to exercise the "keep current" option pursuant to Belanger v. Belanger, 962 F.2d 345 (4th Cir. 1992). In Belanger, the Fourth Circuit Court of Appeals held that Chapter 7 debtors who are current on their secured consumer loan installment payments can retain the collateral and continue to make the contractual payments to their

creditor, after discharge, without either redeeming the collateral or reaffirming the underlying debt. See id.

In support of her argument, the debtor cited In re Parker, 139 F.3d 668 (9th Cir. 1998); In re Boodrow, 126 F.3d 43 (2nd Cir. 1997); and Lowry Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989). As does Belanger, these cases hold that debtors who are current on their loan payments on secured property may choose to keep the property and continue to make the monthly payments to their creditors. See Parker, 139 F.3d at 673; Boodrow, 126 F.3d at 53; West, 882 F.2d at 1545. These cases do not, however, specifically address whether the debtor must be current at the time of the filing of the petition or, rather, by the time the discharge is entered. In fact, in the West and Boodrow cases, the courts specifically found that the debtors were current at the time of the filing of the petition and remained current and maintained adequate insurance on the collateral at issue. See Boodrow at 46; West at 1545.

In the absence of any specific direction by the Fourth Circuit as to the timing of the requirement that the debtor be current before he or she can exercise the "keep current" option, this court is reluctant to extend Belanger beyond its own fact pattern. Consequently, the court concludes that the debtor must be current at the time of the filing of the petition in order to exercise the option of "keeping current" on that indebtedness. Because the

debtor here did not become current until a couple of months after the petition was filed, she does not have the right to exercise the "keep current" option. Consequently, Onyx is entitled to relief from the automatic stay.

It is therefore **ORDERED** that:

1. The debtor's Motion to set aside the August 28, 2003, order is granted; and upon reconsideration of the matter;

2. The debtor's Motion for sanctions is denied; and

3. Onyx Acceptance Corporation is granted relief from the automatic stay.

George R. Hodges
United States Bankruptcy Judge