UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND
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In re: :

RAYMOND E. RATHBUN : BK No. 01-11823
ELIZABETH RATHBUN Chapter 7
Debtors

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TITLE: *In re Rathbun*

CITATION:

DECISION AND ORDER

APPEARANCES:

Seth A. Perlmutter, Esq.
Robert B. Jacquard, Esq.
Attorneys for Debtors
PERLMUTTER & IGLIOZZI
949 Park Avenue
Cranston, Rhode Island 02910

Matthew J. McGowan, Esq.
Attorney for Creditor Sovereign Bank New England
SALTER McGOWAN SYLVIA & LEONARD, INC.
321 South Main Street
Providence, Rhode Island 02903

Gregory Hamilton, Esq.
Chapter 7 Trustee
154 Waterman Street
Providence, Rhode Island 02906

BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Heard on the motion by Sovereign Bank New England, as successor to BankBoston, N.A. ("the Bank"), to compel the Debtors to reaffirm their debt to the Bank, or to surrender collateral consisting of real property. The Debtors now object to reaffirmation, although their statement of intent, filed pursuant to 11 U.S.C. § 521(2)(A), indicates that they will reaffirm the debt. The issues are (1) whether the loan in question is a consumer debt secured by property of the estate, thereby falling under 11 U.S.C. § 521(2)(A); and, if so, what remedy is available to the Bank if the Debtors fail to comply with § 521(2)(B)? The Debtors assert (1) that a loan secured by real property is not a consumer debt; (2) that they may remain in possession of the real estate while current on their mortgage; and (3) that they are entitled to a discharge of the loan without reaffirming their obligation to the Bank.

For the reasons given below, I find and/or conclude that the loan in question *is* a consumer debt, that 11 U.S.C. § 521(2) is applicable, and that the Debtors are required to make one of the statutory elections. I also agree with those courts which grant creditors relief from stay when debtors fail to elect and perform in accordance with § 521(2).

BACKGROUND

In January 1999 the Rathbuns borrowed $25,000 from the Bank, secured by a mortgage on their residence at 3 Briar Avenue in Hope, Rhode Island. When they filed their Chapter 7 petition in May 2001, the Debtors owed the Bank approximately $23,000.

I. CONSUMER DEBT

The Debtors wish to neither reaffirm or surrender, contending that their home mortgage loan is not a consumer debt governed by Section 521(2) which provides:

> The Debtor shall-
> ...
>
> > (2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate -
> >
> > (A) within 30 days after the date of the filing of a petition under chapter 7 of this title …file with the clerk a statement of his intention with respect to the retention of such property and, if applicable, specifying … that the debtor intends to redeem such property …
> >
> > (B) within forty-five days after the filing of a notice of intent … the debtor shall perform his intention with respect to such property …

The Code defines consumer debt as "debt incurred by an individual primarily for a personal, family or household purpose." 11 U.S.C. § 101(8). While Collier's suggests that "[t]o the extent that a debt incurred for personal, household or family purpose is secured by real property, the legislative history indicates that it

will not be a consumer debt." Lawrence P. King et al., Collier on Bankruptcy p. 101-46 (15th Ed. Rev. 2001). The case law pretty much rejects this notion. *See In re Kelly*, 841 F.2d 908, 912 (9th Cir. 1988)("[R]esort to legislative history is not appropriate because the statutory language is clear and precisely addresses the situation."); *see also Guaranty Sav. & Loan Ass'n v. Lowe*, 109 B.R. 698, 699 (W.D. Va. 1990). These courts have noted that the statute is clear, and that the answer to whether a debt is a consumer debt depends, in large part, on whether the debt was incurred with an eye toward profit. *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988). ("Accordingly, the test for determining whether a debt should be classified as a business debt, rather than a debt acquired for personal, family or household purposes, is whether it was incurred with an eye toward profit."); *Citizens Nat'l Bank v. Burns* (*In re Burns*), 894 F.2d 361, 363 (10th Cir. 1990); *accord Cypher Chiropractic Ctr. v. Runski* (*In re Runski*), 102 F.3d 744, 747 (4th Cir. 1996).

The issue whether a home mortgage may constitute consumer debt has been litigated extensively in the context of 11 U.S.C. § 707(b). *See Neary v. Padilla* (*In re Padilla*), 222 F.3d 1184, 1193 (9th Cir. 2000); *Stewart v. United States Trustee* (*In re Stewart*), 175 F.3d 796, 806 (10th Cir. 1999); *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989) (applying § 101(7) - the predecessor to § 101(8),

which contained the same language); *In re Kelly*, 841 F.2d at 912 (same). Although the question whether the Rathbuns' obligation is a consumer debt does not arise in a 707(b) context, it does involve the same definition of consumer debt found in Section 101(8), so these cases are relevant for the purpose of resolving the issue at bench.

The Debtors bear the burden of establishing that the mortgage should be excepted from the provisions of Section 521(2). *See Jodoin v. Samayoa* (*In re Jodoin)*, 209 B.R. 132, 141 (B.A.P 9th Cir. 1997), *quoting Hill v. Smith*, 260 U.S. 592, 595 (1923)("[T]he party claiming the exception to a statutory provision is required to prove the exception.") While such a showing would remove the mortgage from inclusion in the consumer debt equation, thereby making Section 521(2) inapplicable, *see Stewart*, 175 F.3d at 807; *In re Scheinberg*, 132 B.R. 443, 445 (Bankr. D. Kan. 1991); *In re Hall,* 258 B.R. 45, 46 (Bankr. M.D. Fla. 2001), the Debtors have not made such a showing, but focus on whether the property serving as collateral for Sovereign's loan is property of the estate. In their memorandum, however, the Debtors concede that the debt is secured by property of the estate. *See also* 11 U.S.C. § 541(a)(1). As for the question whether the debt is consumer in nature, the only evidence is the Debtors' Statement of Intent filed with the Court, where they concede that the obligation is a consumer debt

secured by property of the estate. It (the Statement of Intent) says: "I have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate." Below this text, they list the real estate at 3 Briar Avenue, Hope, Rhode Island, and state that they wish to reaffirm the debt with Sovereign Bank. More importantly, the Rathbuns purchased and maintained the home as their residence, and there is nothing to suggest that this debt was incurred with an "eye toward profit." Based on the record, the pertinent statute, and the applicable case law, I conclude that the debt to Sovereign is consumer in nature, and rule that they must elect and perform one of the options provided in Section 521(2)(i.e., redemption or reaffirmation). *See In re Burr*, 160 F.3d 843, 848-49 (1st Cir. 1998).

THE REMEDY

We next address the question of what is the creditor's remedy where the Debtors fail to elect or perform their stated intention pursuant to 11 U.S.C. § 521(2)(B) – and this is the real rub in these cases, as the Bankruptcy Code is silent on the issue. *See BankBoston, N.A. v. Claflin* (*In re Claflin)*, 249 B.R. 840, 848 (B.A.P. 1st Cir. 2000); *see also In re Irvine*, 192 B.R. 920, 921 (Bankr. N.D. Ill. 1996) ("[T]here is no statutory sanction for failure to comply with Sections 521(2)(A) and (B)"), so the remedy is an open issue whose resolution, in the absence of statutory

guidance, is left by legislative default to the discretion of the court. *American Nat'l Bank & Trust Co. v. DeJournette*, 222 B.R. 86, 97 (W.D. Va. 1998) (Holding that the resolution of a Section 521 claim is within the court's discretion.)

Having this discretion over the choice of remedy for a debtor's failure to perform his/her stated intention under § 521(2)(B) has led bankruptcy courts to fashion remedies or sanctions under various provisions of the Bankruptcy Code. *See In re Donnell*, 234 B.R. 567, 571 (Bankr. D.N.H. 1999). For example, some courts conclude that compelling debtors to perform their stated intention pursuant to the bankruptcy court's § 105(a) equitable powers is warranted, while others reason that dismissal of the case pursuant to § 707(a) is appropriate. *See In re Claflin*, 249 B.R. at 848-49 (list of courts and their remedies). A third approach, the one with which I agree, is that such remedies should be the exception rather than the norm, given their impractical and/or draconian consequences, *id. quoting In re Donnell* 234 B.R. at 572-74. I will follow *Donnell,* involving a creditor situated similarly to the creditor here, where Judge Deasy granted relief from stay based on the debtors' failure to perform their stated intention pursuant to Section 521(2)(B). As I believe the *Donnell* case to be the best treatment of the subject, I adopt

and incorporate the opinion herein, instead of trying new ways to say the same thing.

Accordingly, because the Debtors have not performed either their stated intention, nor any of the alternatives allowed under 11 U.S.C. § 521(2)(B), Sovereign Bank is granted relief from the automatic stay, with leave to pursue its state court remedies.

Dated at Providence, Rhode Island, this 28th day of December, 2001.

/s/ Arthur N. Votolato
Arthur N. Votolato
U.S. Bankruptcy Judge