UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

In re: Cassandra Birocco

Debtor

Chapter 7
Case No. 09-12521

Not for Publication

MEMORANDUM OF ORDER
(this relates to Doc. #12)

The Debtor filed a Motion to Reopen For Limited Purpose of Filing A Reaffirmation Agreement on April 12, 2013, seeking to reopen her case to enable her to file a Reaffirmation Agreement with the current mortgagee of her principal residence. The motion is filed some three and a half years after the Debtor's case was closed following the granting of a discharge to the Debtor on September 29, 2009. Aware of the great weight of authority against the Debtor because she seeks to reaffirm a debt after the receipt of her discharge, and having previously denied such a motion in another case, the Court provided an opportunity for the Debtor to supplement her motion with a memorandum of law in support of her request. The Memorandum was filed on May 10, 2013. After consideration of the Debtor's Memorandum, the Court concludes that it cannot grant the Debtor any meaningful relief because §524(c)(1) of the Bankruptcy Code[1] expressly requires that reaffirmation agreements be executed prior to the entry of a debtor's discharge. As a consequence, reopening Debtor's bankruptcy case would serve no purpose.

In her Memorandum the Debtor explained[2] that on three occasions during the pendency of her case and prior to the entry of her discharge she requested to reaffirm the debt to the mortgagee

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[1] Unless otherwise indicated, all references to the "Bankruptcy Code" shall refer to the applicable sections of the United States Code 11 U.S.C. § 101 *et seq*.

[2] No objections to the Motion have been filed. The Court accepts the unopposed facts set forth in the Debtor's Motion and Memorandum.

at the time, First Horizon Home Loans ("First Horizon"). The Debtor's request was denied because First Horizon had a policy not to enter into reaffirmation agreements regarding such debts. Therefore, no reaffirmation agreement was filed during the case. Notwithstanding, the Debtor continued to make her monthly mortgage payments to First Horizon and subsequently to the current holder of the mortgage, Nationstar Mortgage,[3] and remains current on the mortgage debt.[4] Mem. p. 2 at ¶¶ 4-8.

The Debtor seeks to reaffirm the underlying mortgage debt for two reasons. First,"to improve her ongoing credit for her timely mortgage payments with the credit bureaus." Second, "to attempt to obtain a loan modification which she cannot due as the subject loan was not Reaffirmed when the Bankruptcy case was active," having been "advised by her current mortgagee that they cannot modify her loan obligation because it was not reaffirmed during her bankruptcy." Mem. p. 2 at ¶¶ 9-11. According to the Debtor, Nationstar has agreed to a reaffirmation agreement if the Court will reopen the case so such agreement can be filed. Mem. p. 2 at ¶ 11.

To his credit and with utmost candor, Debtor's counsel acknowledges that most of the courts that have considered the issue are squarely against the Debtor, citing twenty court decisions disallowing the reopening of a case to file a post-discharge reaffirmation agreement or holding that

[3] At the time of her pending bankruptcy case, the mortgage was held by First Horizon Home Loans. In her Memorandum, the Debtor states that the "first Mortgage company was purchased by Nationstar Mortgage." (Doc. #15, Mem. at p. 2, ¶7).

[4] Pursuant to Bankruptcy Code § 524(j)(1)-(3), the discharge of a debtor's personal liability for a secured debt does not enjoin an act by such creditor against the principal residence of a debtor in which the creditor retains its security interest, including enforcement of its lien through in rem proceedings. And the discharge injunction does not bar such creditor from obtaining periodic payments on account of a valid security interest in lieu of pursuing enforcement of its lien through in rem relief. *See also Couture v. Pawtucket Credit Union*, 765 A.2d 831, 833 (R.I. 2001) ("Because a bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor in personam, … it leaves intact other modes of enforcement, including, without limitation, an action against the debtor in rem ….") (internal quotations and citations omitted). Additionally, § 524(f) expressly provides that a debtor may voluntarily repay any discharged debt.

the reaffirmation agreement must be filed prior to the entry of the discharge and is otherwise unenforceable. *See, e.g., In re Wright,* Case No. 12-47606 (Bankr. E.D. Mich. Dec. 6, 2012) (disallowing motion to reopen case to file reaffirmation agreement signed well after the entry of the discharge because it would serve no purpose as reaffirmation agreement must be entered into prior to entry of discharge); *In re Smith*, 467 BR 122 (Bankr. W.D. Mich. 2012) (debtor's motion to set aside discharge so reaffirmation agreement can be filed denied as contrary to requirement of § 524(c)); *In re Smith*, 2012 WL 441322 (Bankr. N.D. Ohio Feb. 10, 2012) (discharge cannot be revoked to circumvent deadline set forth in FED. R. BANKR. P. 4008(a) for filing reaffirmation agreements); *In re Golden*, Case No. 11-60732 (Bankr. E.D. Mich. Dec. 2, 2011) (deadline to enter into reaffirmation agreement is date of entry of discharge and court cannot extend the deadline once discharge has entered); *In re Owens*, Case No. 09-35753 (Bank. E.D. Tenn. Feb. 25, 2010) (reaffirmation agreements must be made prior to discharge and requirement cannot be avoided by seeking to set aside discharge).

Based on the unambiguous requirement of § 524(c)(1) and the overwhelming case law on the issue, this Court recently denied a similar motion to reopen a chapter 7 case filed for the purpose of filing a reaffirmation agreement after the discharge had entered. *In re Vargas*, Case. No. 10-10563 (Bankr. D.R.I. April 8, 2013) (Doc. #13), (*citing In re Zaochney*, 2012 Bankr. LEXIS 520 (Bankr. D. Alaska Feb. 15, 2012) (motion to reopen a chapter 7 case denied where purpose was to file reaffirmation agreement after discharge had entered); *In re Sanburg Fin. Corp*., 446 B.R. 793 (S.D. Tex. 2011) (reaffirmation agreements are unenforceable under § 524(c) because, among other reasons, the agreements were not made prior to the debtor's discharge) *aff'd Sandburg Fin. Corp. v. Am. Rice, Inc. (In re Am. Rice, Inc.)*, 2011 U.S. App. LEXIS 261772 (5th Cir. Sept. 22, 2011); *In re Edwards*, 236 B.R. 124, 126 (Bankr. D.N.H. 1999) (where Debtor has

been granted a discharge, any reaffirmation agreement entered into subsequently will be unenforceable)).

The lone case relied upon by the Debtor, *Diaz v. Chrysler Fin. Co.*, 2001 WL 123622 (E.D. Pa. Feb. 5, 2001), does not persuade the Court otherwise. Both the facts and the context in which the issue arose in *Diaz* are distinguishable from the Debtor's situation here. The debtors in *Diaz* had their vehicle repossessed by the lender two years after the debtors had been granted a discharge and their case closed. Although no reaffirmation agreement had been filed by the debtors with respect to the vehicle, the parties had contemplated entering into such an agreement and for a two year period post-discharge had acted as if one was in place. The debtors continued to make the monthly payments on the loan and continued in possession of the vehicle during this time. The lender regularly accepted the payments, but at some point concluded that the debtors were in default in their payments and repossessed the vehicle without any prior notice to the debtors. Contrary to the lender's belief, the debtors maintained that they were current in their payments as of the date of repossession. The debtors had sought an order from the bankruptcy court to enjoin a sale of the vehicle by the lender and for return of the vehicle. The bankruptcy court *sua sponte* reopened the case and granted the requested relief to the debtors in the form of a *nunc pro tunc* reaffirmation agreement. The lender appealed. Under these unique circumstances, which are materially different than those the Debtor presents to this Court, the district court affirmed the order of the bankruptcy court.

Essentially, the bankruptcy court in *Diaz* applied principles of judicial estoppel against the lender based on the course of dealings of the parties over the two-year post-discharge period as if a reaffirmation agreement was in fact in place and enforceable. Therefore, the bankruptcy court found that it would be unjust to permit the lender to repossess the vehicle without providing notice

to the debtors of the asserted payment delinquency. The bankruptcy court concluded:

> Although it is true that a reaffirmation agreement was never executed, the parties acted as though one had been, at least in the most significant respect, to wit: the tender and acceptance of monthly payments for approximately two years. It is wholly inequitable against this backdrop for Chrysler to maintain it was at liberty to repossess the vehicle without any form of prior notice of delinquency, such as might have been required under the original note or other applicable non-bankruptcy law.

Id. at 5.

The district court ruled that under the "unusual circumstances" presented and the "balance of the equities," it was not error for the bankruptcy court to estop the lender from relying on the lack of a reaffirmation agreement in support of its position and conduct. *Id*. at 6.

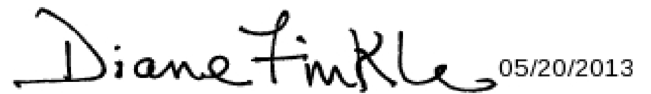
While this Court is not unsympathetic to the Debtor's situation, the Debtor does not complain of inequitable conduct on the part of Nationstar, nor does it appear from the Motion that the Debtor faces any threat by Nationstar of losing her residence. Under the facts presented, this is not the type of unusual circumstances that might justify fashioning a remedy to afford the relief the Debtor seeks. Moreover, in denying the Motion, the Debtor is not without alternative remedies, albeit ones the Debtor likely views as less desirable. For instance, to address the credit history issue, the Debtor could provide a written explanation to the various credit reporting services of the circumstances described in the Motion regarding the mortgage and her history of regular monthly mortgage payments despite the lack of an executed reaffirmation agreement with Nationstar and request that this explanation be included in her credit report. *See* 15 U.S.C. § 1681c(f) ("If a consumer reporting agency is notified … that information regarding a consumer who was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information."). As to her desire for a loan

modification, if Nationstar will not agree to such negotiations in light of the denial of this Motion, the Debtor could seek to impose such negotiations under the Court's Loss Mitigation Program (R.I. LBR Appendix IX) by filing a new bankruptcy case under Chapter 13 or Chapter 7.

For the foregoing reasons, the Motion to Reopen For Limited Purpose of Filing A Reaffirmation Agreement is Denied.

Dated: this 20th day of May, 2013.

By the Court,



Diane Finkle
U.S. Bankruptcy Judge