UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: CASE NO. 04-92456

Christopher S. Wathey and Heather L. Wathey,

CHAPTER 7

Debtor. JUDGE MASSEY

ORDER DENYING MOTION TO REOPEN

With their petition commencing this Chapter 7 case, Debtors filed a Statement of Intention in which they stated their intention to reaffirm debt secured by their residence that they owed to Chase Manhattan Mortgage Corp. and to "Bank One." On Schedule D, Debtors stated that Chase held the first priority security deed on their residence and that Bank One held the second priority security deed. Thereafter, Debtors reaffirmed the debt owed to "Bank One, Wisconsin" pursuant to an agreement that they signed on April 25, 2004. Their attorney participated in the decision to reaffirm the debt as evidenced by his "certification" on the last page of the form, which presumably Bank One provided. Debtors reaffirmed this second mortgage debt even though on April 21, 2004, Chase had filed a motion for stay relief. The Court granted Chase's motion on May 13, 2004, three days before the reaffirmation agreement was filed with the Court on May 17. Thereafter, the Trustee filed a report of no assets, and the Court entered an Order discharging Debtors and closing the case on August 3, 2004.

On October 15, 2004, Debtors moved to re-open the case. The motion states that Mr. Wathey lost his job and cannot pay ongoing obligations. Debtors further state that they filed an amendment to their Statement of Intention and that the only relief sought is "the surrender of the Debtors' residence."

Debtors paid the filing fee to reopen the case and filed amended Schedules D and I and an amended statement of intention showing that Debtors surrender their residence.

Section 521(2) of the Bankruptcy Code, requiring a debtor to file and perform a statement of intention, states:

> 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 thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
> > >
> > > (B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and
> > >
> > > (C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title[.]

11 U.S.C.A. § 521.

Rule 1009(b) of the Federal Rules of Bankruptcy Procedure governs the timing of amendments to a statement of intention. It provides:

> (b) Statement of Intention. The statement of intention may be amended by the debtor at any time before the expiration of the period provided in § 521(2)(B) of the Code. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby.

Fed. R. Bank. P. 1009(b).

The enforceability of a reaffirmation agreement is governed by section 524(c) of the Bankruptcy Code, 11 U.S.C. § 524(c), which provides in relevant part as follows:

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

> (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;
>
> (2) (A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and
>
> (B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;
>
> (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—
>
> > (A) such agreement represents a fully informed and voluntary agreement by the debtor;
> > (B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and
> > (C) the attorney fully advised the debtor of the legal effect and consequences of—
> >
> > > (i) an agreement of the kind specified in this subsection; and
> > > (ii) any default under such an agreement;
>
> (4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim[.] . . .

There is no need to reopen the case to alter the statement of intention because it is too late to do so under Bankruptcy Rule 1009(b). Furthermore, section 524(c) does not imply, let alone state, that amending a statement of intention would effect a rescission of a reaffirmation agreement or would extend the time within which to rescind. Instead, that section provides only that a debtor may rescind a reaffirmation agreement "at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later." Nor does section 521 permit amendment of a statement of intention for the purpose of undoing a reaffirmation of a debt.

Unless the reaffirmation agreement can be set aside for failure to comply with section 524(c), Debtors are bound by it. The unfortunate financial reversal apparently suffered by Mr. Wathey is not a ground on which the Court can set aside the reaffirmation agreement. The motion to reopen does not parce the reaffirmation agreement to show, and does not otherwise assert, that the reaffirmation agreement is unenforceable.

Finally, the motion to reopen could be read as initiating a contested matter, because it implicitly seeks relief adverse to the rights of Bank One, Wisconsin. Bankruptcy Rule 9014 requires that motions initiating contested matters be served in the same manner as a summons and complaint under Bankruptcy Rule 7004. Debtors' counsel served the motion by mail on "Bank One, P.O. Box 94015, Palatine, IL 60194," according to the certificate of service filed on January 25, 2005. To the extent that Debtors intended that a ruling on the motion to reopen should adjudicate their liability to Bank One, the described service did not comply with Bankruptcy Rule 7004.

For these reasons, it is

ORDERED that the Debtors' motion to reopen this case is DENIED without prejudice. The Clerk is directed to refund the filing fee paid in connection with the motion. The Clerk is further directed to serve Debtors, Debtors' counsel, the Chapter 7 Trustee and Bank One at the address stated in the certificate of service filed on January 25, 2005.

Dated: February 16, 2005.

James E. Massey

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE