




SO ORDERED.

SIGNED this 6th day of December, 2017.

  
BENJAMIN A. KAHN  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

In re:	)	
	)	
Wendy Stone Carmichael,	)	Case No. 17-11089
	)	
Debtor.	)	Chapter 7
_____	)	

**Order Setting Hearing on Reaffirmation Agreement**

This matter is before the Court on the Reaffirmation Agreement [Doc. 11] (the "Reaffirmation Agreement") filed on December 4, 2017, by Fidelity Bank, purporting to reaffirm an obligation between Wendy Stone Carmichael ("Debtor") and Fidelity Bank.

The obligation sought to be reaffirmed is secured by a 2012 Lincoln MKX (the "Vehicle"). On schedule I and J, Debtor represented that her monthly income is \$2,795.88 and her expenses are \$4,020.49, leaving a negative monthly income of \$1,224.61. On her reaffirmation coversheet, which shows indications that numbers have been whited out and re-written, her total monthly expenses have been changed to match her

schedule I income to the penny. Debtor's explanation for this difference is: "not getting nails done, never go out to eat, someone else helps paying bills, lowered phone bill."<sup>1</sup> The Reaffirmation Agreement contemplates that the Debtor will make payments of \$610.04 each month for 23 months so that she can retain the Vehicle. Of Debtor's \$4,020.49 in expenses on Schedule J, the Debtor lists \$110 for "Cell Phone," \$612 for "Food and housekeeping supplies," \$75 for "Entertainment, clubs, recreation, newspapers, magazines, and books," and \$150 for "Emergency/Miscellaneous."

Section 524(c) sets forth the requirements for an enforceable reaffirmation agreement. Among those requirements, when a debtor is represented by counsel in negotiating the reaffirmation agreement, an effective reaffirmation agreement must be accompanied by a declaration or affidavit of the attorney that provides: "(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 [11 U.S.C. § 524(c)]; and (ii) any default under such agreement." 11 U.S.C. § 524(c) (3).

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<sup>1</sup> Although the Debtor indicates that "someone else helps paying bills," she has not increased her stated income on the cover sheet or in her Statement in Support of Reaffirmation Agreement under Part II of Official Form 2400A. Debtor also has not filed an amended Schedule I or J.

Where a debtor is not represented by counsel during the course of negotiating a reaffirmation agreement, the reaffirmation agreement will not be enforceable unless the court approves the reaffirmation agreement as not imposing an undue hardship on the debtor or a dependent of the debtor and being in the best interest of the debtor. 11 U.S.C. § 524(c)(6). Local Rule 4008-1(d) provides:

**Reaffirmation Agreement Without Counsel Certification.**

Any reaffirmation agreement that is unaccompanied by a certification of counsel as contemplated under 11 U.S.C. § 524(c)(3) shall be considered by the court under 11 U.S.C. §§ 524(c)(6) and/or (d).

(emphasis added).

Part IV of Official Form 2400A contains a Certification by Debtor's Attorney (If Any). The certification in Official Form 2400A contains language that complies with the requirements of section 524(c)(3). Instead of signing the certification on Official Form 2400A or another declaration or affidavit with the language contemplated by section 524(c)(3), counsel submitted his own affidavit that does not aver to the statements required by the Bankruptcy Code. See Doc. 10 (the "Affidavit"). Specifically, the Affidavit equivocates that "the Agreement does not impose an [sic] **financial or budgetary** undue hardship on said Debtor or her dependents . . . ." Affidavit ¶ 7 (bold in original Affidavit). The Affidavit further equivocates: "[A]ssuming that said Debtor can afford the vehicle payment, I

can state that a Reaffirmation is necessary and would not present an undue hardship." This latter statement is conditional in at least two ways. First, it takes no position on whether the Debtor can afford the payment, and then conditions counsel's affirmation on a factor for which counsel professes to take no position. Second, by using the indefinite article "a" instead of "the" when referring to "a Reaffirmation," it only states that some form of reaffirmation is necessary, rather than averring that the particular agreement before the Court is necessary.<sup>2</sup>

Counsel cannot abrogate his duty to determine whether a proposed reaffirmation agreement is necessary and imposes an undue hardship under the debtor's particular circumstances. As this Court previously has explained to this counsel:

When advising debtors concerning reaffirmation agreements, the role of debtor's attorney emphasizes the attorney's role as counselor . . . .

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<sup>2</sup> The Affidavit further waxes philosophically about the existence and potential effect of the ipso facto provision in the underlying pre-bankruptcy agreement, although that issue is well settled in this district. See, Riggs Nat'l Bank of Washington, D.C. v. Perry, 729 F.2d 982, 984-85 (4th Cir. 1984) ("default upon filing clauses [are] unenforceable as a matter of law"); Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161, 175-76 (E.D.N.C. 2008) (holding that the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") only partially abrogated the holding in Riggs; when the debtor timely complies with §§ 521(a)(2) and 524(c), such clauses remain unenforceable post-BAPCPA); In re Perkins, 418 B.R. 680, 682 (Bankr. M.D.N.C. 2009) (following Hardiman); In re Hill, Case No. B-09-50179CV-W, 2009 WL 1651241, \*1 (Bankr. M.D.N.C. June 9, 2009) (same); In re Orr, Case No. 09-50830C-7W, 2009 WL 2245156, \*1 (Bankr. M.D.N.C. July 23, 2009) (same); In re Tucker, Case No. 09-11443C-7G, 2009 WL 4405948, \*1 (Bankr. M.D.N.C. Dec. 1, 2009) (same). On the other hand, if the debtor fails to timely comply with §§ 521(a)(2) and 524(c), the automatic stay will be lifted under § 362(h), and the ipso facto provision will be enforceable. See In re McMullen, 443 B.R. 67, 70 (Bankr. E.D.N.C. 2010).

[D]ebtors' attorneys may misperceive their role in representing clients regarding reaffirmation agreements. It is not enough for an attorney to advise the clients of their rights and allow them to make a business decision. The attorney must exercise independent judgment. If the attorney cannot affirmatively state that the agreement does not impose an undue hardship on the debtor, the attorney must decline to sign a declaration attached to the agreement. By so doing, the attorney will assure judicial review and a hearing where the court will determine whether the agreement is in the best interest of the debtor.

In re Griffin, 563 B.R. 171, 175 (Bankr. M.D.N.C. 2017) (quoting In re Vargas, 257 B.R. 157, 160 (Bankr. D.N.J. 2001)). Offered these two options, counsel contumaciously has attempted to choose a third, signing an affidavit that is not contemplated by the Code, is insufficient for purposes of section 524(c)(3), and the Court only can surmise is done to leave stealthily unenforceable reaffirmation agreements lying in wait for unsuspecting creditors who violate a discharge injunction. This Court will not participate in such a game of "gotcha," especially with such powerful and vital provisions of the Code as the discharge injunction.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1) The Affidavit does not comply with 11 U.S.C. § 524(c)(3). Therefore, the Court will consider the Reaffirmation

Agreement as a pro se reaffirmation agreement under Local Rule 4008-1(d) and 11 U.S.C. § 524(c)(6).

2) The Clerk of Court shall schedule and notice a hearing on the Reaffirmation Agreement according to the practice in this district for considering pro se reaffirmation agreements under 11 U.S.C. § 524(c)(6).

3) Counsel who signed the Affidavit shall appear at the hearing scheduled in this case regardless of whether the Reaffirmation Agreement is rescinded, and the individual counsel in his firm who signs any affidavit in connection with a reaffirmation agreement in the future shall appear at any hearing scheduled by the Court on the affected reaffirmation agreement.

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