



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: May 17, 2018

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**JAMES ROACH AND
CATONIA ROACH,**

CASE NO. 17-14714-NPO

DEBTORS.

CHAPTER 7

**ORDER ON REAFFIRMATION AGREEMENT BETWEEN JAMES ROACH AND
NATIONSTAR MORTGAGE LLC d/b/a MR. COOPER AND RESETTING HEARING**

This matter came before the Court for hearing on April 19, 2018 (the “Hearing”), on the Motion to Extend Deadline for Filing Reaffirmation (the “Motion”) (Dkt. 19) filed by the debtors, James Roach and Catonia Roach (the “Debtors”), and the purported Reaffirmation Agreement and other related documents (the “Purported Reaffirmation Agreement”) (Dkt. 20) filed by Nationstar Mortgage LLC d/b/a Mr. Cooper (“Nationstar”) in the above-referenced chapter 7 bankruptcy case (the “Bankruptcy Case”). Because Nationstar filed the Purported Reaffirmation Agreement the same day the Debtors filed the Motion, the Court entered the Order Withdrawing Motion to Extend Deadline for Filing Reaffirmation [Dkt #19] (Dkt. 25) on March 27, 2018. In the Purported Reaffirmation Agreement, James Roach¹ seeks to reaffirm a debt of \$44,388.67 owed to

¹ Official Form 106D provides that “Debtor 1 only” owes the debt to Nationstar secured by 1203 Fourth Avenue, Indianola, Mississippi 38751. (Dkt. 1). Thus, James Roach signed the Purported Reaffirmation Agreement while Catonia Roach did not. (Dkt. 20).

Nationstar. The Purported Reaffirmation Agreement contemplates repayment of the debt allegedly owed Nationstar in monthly installments of \$565.77 for 163 months at an annual interest rate of seven percent (7%). The proposed monthly payment of \$565.77 appears to be the same amount James Roach agreed to pay Nationstar before the commencement of the Bankruptcy Case. The Purported Reaffirmation Agreement indicates the debt is secured by real property at 1203 Fourth Avenue, Indianola, Mississippi 38751. The Purported Reaffirmation Agreement was signed by James Roach on February 16, 2018, counsel for the Debtors on February 28, 2018, and Nationstar on March 13, 2018. Importantly, however, the Court entered the Order of Discharge (Dkt. 17) on March 9, 2018, granting a discharge to the Debtors before Nationstar signed the Purported Reaffirmation Agreement.

Discussion

The bankruptcy code (the “Code”) limits a debtor’s ability to enter into a reaffirmation agreement. 11 U.S.C. § 524. For such an agreement to be valid, it must fully comply with the requirements of 11 U.S.C. § 524(c), (d), and (m) and Rules 4004(c)(1)(J), (K) and (c)(2) and 4008 of the Federal Rules of Bankruptcy Procedure. *See Sandburg Fin. Corp. v. Am. Rice, Inc. (In re Am. Rice, Inc.)*, 448 F. App’x 415, 419 (5th Cir. 2011) (citing *Chase Auto Fin., Inc. v. Kinion (In re Kinion)*, 207 F.3d 751, 766 (5th Cir. 2000) (holding that a reaffirmation agreement that is “flawed” under 11 U.S.C. § 524(c) is “unenforceable”). An agreement to pay a discharged debt that does not strictly satisfy these requirements is invalid. 4 COLLIER ON BANKRUPTCY ¶ 524.01 (16th ed. 2018). One of these requirements is that the reaffirmation agreement be “made before the granting of the discharge under section 727.” 11 U.S.C. § 524(c)(1). Previously, this Court has denied a motion for approval of a reaffirmation agreement that was not signed prior to the entry of the discharge order. *See Order Denying Motion for Approval of Post-Discharge*

Reaffirmation Agreement between Debtor and Santander Consumer USA d/b/a Drive Financial (Dkt. 39), *In re Jones*, No. 12-13075-NPO (Bankr. N.D. Miss. May 13, 2013) (denying motion for approval of reaffirmation agreement when both the debtor and the creditor signed the reaffirmation agreement after the debtor received her discharge); *see also In re Collins*, 243 B.R. 217, 220 (Bankr. D. Conn. 2000) (reaffirmation agreement “made” when fully executed). Because the Purported Reaffirmation Agreement at issue here was signed by Nationstar after the discharge was entered, the Court instructed the Debtors at the Hearing to provide legal authority in support of its validity. The Court did not address any other issues at that time.

On May 2, 2018, the Debtors filed the Letter Brief (the “Debtors’ Brief”) (Dkt. 31), asserting that at least one bankruptcy court has found that a reaffirmation agreement is “made” when the debtor, rather than the creditor, signs the agreement. *See In re Merritt*, 366 B.R. 637 (Bankr. W.D. Tex. 2007). In *In re Merritt*, the debtor signed a reaffirmation agreement on November 18, 2005 and received her discharge on January 26, 2006. The creditor, however, did not sign the reaffirmation agreement until April 4, 2007 when it filed the agreement with the bankruptcy court. Thus, the Texas bankruptcy court in *In re Merritt* was tasked with determining whether the parties agreed to the reaffirmation agreement prior to discharge when only the debtor’s signature appeared on the agreement at the time she received her discharge.

Because reaffirmation agreements also must be “enforceable under applicable nonbankruptcy law,” the bankruptcy court analyzed whether the parties mutually assented to be bound by the reaffirmation agreement before the debtor received her discharge. *See* 11 U.S.C. § 524(c). In determining mutual assent, “a court looks at the communications between the parties and the acts and circumstances surrounding those communications.” *In re Merritt*, 366 B.R. at 641. In *In re Merritt*, before the debtor received her discharge, the debtor disclosed her intention

to reaffirm the debt in her schedules that she filed with her petition, the creditor drafted the reaffirmation agreement, and the debtor handwrote all of her information in the agreement, “including the explanation for why the agreement d[id] not represent an undue hardship.” *Id.* Additionally, the creditor did not agree to change any of the terms of the original agreement between the parties, “and so ‘offered’ nothing in exchange for the debtor’s ‘agreement’ to reaffirm, save its understandable willingness to have the debtor make such an agreement.” *Id.* The bankruptcy court found that these facts supported the conclusion that the creditor prepared the reaffirmation agreement “and sent it to the debtor for completion, following up on the debtor’s stated intention.” *Id.*

While the bankruptcy court was unable to determine why the creditor did not promptly sign and return the reaffirmation agreement, it found that the creditor’s reason for delay was irrelevant because “[t]he fact that the debtor promptly signed an agreement to waive her discharge as to [the creditor], using a form furnished to her by [the creditor], constitutes objective evidence of the assent on the part of both the debtor and [the creditor] that the reaffirmation agreement as written constituted the agreement of the parties.” *Id.* Further, “an agreement that is in the nature of a waiver does not normally require the assent of the party in whose favor waiver is given, because waiver is simply the intentional relinquishment of a known right by the party against whom waiver is asserted.” *Id.* In the reaffirmation agreement, the debtor was giving up, or waiving, the protections offered to her under the Code with respect to this specific debt owed to the creditor. Thus, the bankruptcy court held that the reaffirmation agreement was “a straightforward waiver of discharge with respect to this creditor” and was made when the debtor signed the agreement provided to her by the creditor. *See id.* at 641-42.

Here, the Court also must determine whether the parties agreed to the Purported Reaffirmation Agreement prior to discharge when only James Roach’s signature, along with the signature of his attorney, appeared on the agreement at the time the Debtors received their discharge. In Mississippi, an enforceable contract requires mutual assent, often referred to as “meeting of the minds.” *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2003). It is well-established that a court in Mississippi cannot “draft a contract between two parties where they have not manifested a mutual assent to be bound.” *A. Copeland Enters. v. Pickett & Meador, Inc.*, 422 So. 2d 752, 754 (Miss. 1982). The Fifth Circuit Court of Appeals has stressed that “[t]he reaffirmation rules are intended to protect debtors from compromising their fresh start by making unwise contracts to repay dischargeable debts. Because of th[is] danger . . . strict compliance with the specific terms in Section 524 is mandatory.” *In re Am. Rice*, 448 F. App’x at 419 (quotation omitted). Thus, the debtor and the creditor should sign and file the reaffirmation agreement before the bankruptcy court enters the discharge order or, when necessary, timely file a motion seeking additional time to file the reaffirmation agreement, for “great mischief could be invited” when the parties deviate from this practice. *In re Merritt*, 366 B.R. at 639. Nonetheless, *In re Merritt* provides a narrow exception to this general rule when the reaffirmation agreement simply evidences the debtor’s waiver of the Code’s protections with respect to the debt owed to a particular creditor.²

² The bankruptcy court in *In re Merritt* noted that “[r]eaffirmation agreements, of course, *could* consist of more than simply this waiver. The debtor and creditor might decide, as a condition to reaffirmation, to alter the terms of the underlying contract, to waive a pre-petition default, to extend the term, or the like. Such changes would of course require the creditor’s assent, and a court would be justified in normally expecting the form of that assent to be expressed with a written signature.” *In re Merritt*, 366 B.R. at 641.

After fully considering the matter, the Court finds that the facts in the Bankruptcy Case are nearly identical to those that were before the bankruptcy court in *In re Merritt*. Like the debtor in *In re Merritt*, James Roach disclosed his intention to reaffirm his debt with Nationstar on Official Form 108 that he filed with his petition. (Dkt. 1). Additionally, in the Debtors' Brief, the Debtors' alleged that "[t]he creditor prepared the agreement, and no terms of the original agreement between the parties prior to the bankruptcy were changed." (Dkt. 31). Finally, James Roach handwrote all of his information in the agreement, including his explanation for why the agreement does not represent an undue hardship. Accordingly, the Court follows *In re Merritt* and finds that the Purported Reaffirmation Agreement memorializes James Roach's waiver of his protections under the Code with respect to the debt owed to Nationstar and was made when James Roach signed the agreement provided to him by Nationstar.

Additionally, the Court notes that the Purported Reaffirmation Agreement presumes that it will pose an undue hardship on James Roach. While the monthly payment required for the reaffirmed debt is \$565.77, James Roach has only \$2.22 available to pay the reaffirmed debt with Nationstar. (Dkt. 20). James Roach alleges, however, that he can afford to make his payments on the reaffirmed debt because he is "working on reducing monthly expenses and [his] spouse is seeking employment." (*Id.*) To ensure the Purported Reaffirmation Agreement complies with 11 U.S.C. § 524(m), the Court will schedule an evidentiary hearing for James Roach to testify as to how and from what sources he will obtain additional funds to make the monthly payments as agreed upon under the terms of the Purported Reaffirmation Agreement.

IT IS, THEREFORE, ORDERED that the Purported Reaffirmation Agreement was made before the Debtors received their discharge.

IT IS FURTHER ORDERED that the Hearing on the Purported Reaffirmation Agreement is reset for May 31, 2018, at 10:00 a.m. in the Greenville Federal Building, 305 Main Street, Greenville, Mississippi.

##END OF ORDER##