UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: MICHELLE M. JEANFREAU **CASE NO. 13-50015-KMS**

DEBTOR **CHAPTER 7**

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion to Compel Compliance With 11 U.S.C. § 521(a)(2) and to Delay Entry of Discharge (Dkt. No. 13) filed by Hancock Bank, and the Response to Motion to Compel Compliance with 11 U.S.C. § 521(a)(2) and to Delay Entry of Discharge (Dkt. No. 19) filed by the debtor, Michelle M. Jeanfreau ("Jeanfreau or Debtor"), in the above-styled bankruptcy case. A hearing (the "Hearing") was held on May 2, 2013, at which time the Court granted Hancock Bank's motion.[1] This Memorandum Opinion and Order is entered in accordance with the Court's bench ruling.

I. JURISDICTION

The Court has jurisdiction over the subject matter of and the parties to this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), and (O).

II. BACKGROUND

1. On January 3, 2013, Jeanfreau filed a voluntary petition[2] for relief under Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code").[3] On the same date, Jeanfreau filed her Bankruptcy Schedules and Statement of Financial Affairs required under § 521(a)(1),

[1] At the Hearing, David L. Lord appeared on behalf of Jeanfreau and William P. Wessler appeared on behalf of Hancock Bank.

[2] *In re Jeanfreau*, No. 13-50015-KMS (Bankr. S.D. Miss. filed Jan. 3, 2013).

[3] Hereinafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code, unless otherwise noted.

and her Chapter 7 Individual Debtor's Statement of Intention ("Statement of Intention") required under § 521(a)(2).[4]

2. On Schedule A, Jeanfreau listed homestead property located at [redacted] (the "Property"), with a value of $150,000.00 and a secured claim of $119,612.00.[5] Hancock Bank ("Hancock") is listed on Schedule D as the holder of the secured claim on the Property.[6] Pursuant to Miss. Code Ann. § 85-3-21, Jeanfreau claimed an exemption on Schedule C in the amount of $30,388.00.[7]

3. On her Statement of Intention, Jeanfreau indicated her intent to retain the Property.[8] Rather than marking one of the boxes on the bankruptcy form to show a choice to either redeem the property or reaffirm the debt, Jeanfreau marked the box designated as "Other" with an added explanation that "[d]ebtor will continue making payments to creditor without reaffirming."[9]

4. Hancock filed its Motion to Compel Compliance with 11 U.S.C. § 521(a)(2) and to Delay Entry of Discharge ("Motion") on April 17, 2013. The bank moved to compel the Debtor to comply with her duties under § 521(a)(2) and to delay the Debtor's discharge until the Court rules or until the Debtor complies with her statutory duties. Hancock avers that a reaffirmation agreement was forwarded to Debtor's counsel, but that counsel has advised Hancock that the Debtor will not execute a reaffirmation agreement on the debt. The bank

[4] Dkt. No. 3.

[5] *Id.* at 1.

[6] *Id.* at 7.

[7] *Id.* at 6.

[8] *Id* . at 27.

[9] *Id.*

contends the Debtor is required to reaffirm, redeem or surrender pursuant to § 521(a)(2), and that no other option is allowed under the Bankruptcy Code.[10] Hancock requests reasonable attorney's fees and costs in filing and prosecuting the motion.

5. Jeanfreau filed her Response to the Motion ("Response") contending that she has complied with § 521(a)(2) and that she is not required to either reaffirm, redeem or surrender the Property. The Debtor alleges that she filed her Statement of Intention timely and that it states her intention to retain Hancock's collateral and continue making payments without reaffirming. The Debtor claims that Hancock Bank provided no authority for its request to delay entry of the Debtor's discharge and states that the Motion is not supported by current law.

6. The matter was set for hearing on May 2, 2013, at which time the Court issued a bench ruling that no "ride through" option is available to the Debtor in accordance with *Johnson v. Sun Finance Co. (In re Johnson)*, 89 F. 3d 249 (5th Cir. 1996), which the Court is bound to follow. The following is issued in support of the Court's ruling from the bench.

III. ANALYSIS

Section 521 of the Bankruptcy Code sets out duties of a debtor including the requirement to file a statement of intention regarding debts secured by property of the estate, and the time within which a debtor must perform his intention with respect to the property:

> (a) The debtor shall –
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> (2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

[10] Hancock cites *Johnson v. Sun Finance Co. (In re Johnson)*, 89 F. 3d 249 (5th Cir. 1996), as authority for its position that, with respect to a secured debt, a Chapter 7 debtor's only options are to reaffirm, redeem or surrender collateral. Hancock argues that *Johnson* remains good law after enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (2005), citing as support *Habersham Bank v. Harris (In re Harris)*, 421 B.R. 597 (Bankr. S.D. Ga. 2010) and *In re Steinberg*, 447 B.R. 355 (Bankr. S.D. Fla. 2011). Hancock recognizes that some courts have allowed debtors to retain real property without reaffirming in Circuits, unlike the Fifth and Eleventh Circuits, where the "ride through" option was allowed under case law prior to passage of BAPCPA. Dkt. No. 13, at 2.

> (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, 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;

11 U.S.C. § 521(a)(2)(A) (emphasis added).

In *Johnson*, the Fifth Circuit analyzed the debtor's duties under § 521. *In re Johnson,* 89 F.3d 249. Section 521 has been amended since *Johnson* was decided, but the pertinent language remains the same.[11] The debtors in *Johnson* argued that the three options that were set forth in the statute were not exclusive and that the debtor could retain the property[12] until a request for turnover from the trustee, seizure pursuant to state court process or rescission of the contract. *Id.* at 251. The Court commented that the topic had been the subject of much litigation stating that "[w]hether a debtor is limited to the three options of reaffirmation, redemption or surrender of the property, and the meaning of Section 521(2) has been hotly contested in recent jurisprudence." *Id.* The Court noted a split in the Circuit Courts with the Seventh and Eleventh Circuits holding that the debtors must either reaffirm the debt, redeem the property or surrender the collateral, and the Fourth and Tenth Circuits holding that the debtor was not prevented from

[11] The Code section designated as § 521(2) at the time of *Johnson* was divided into subparts (A)-(C) and the 30 day period designated in subsection (B) was a 45 day period. Additionally, the prior statute specified applicability to "consumer" debts secured by property of the estate, whereas the "consumer" designation is not contained in the current text of § 521(a)(2).

[12] The secured property at issue in *Johnson* was personal property (a camcorder). As discussed herein, BAPCPA amendments specifically address personal property on which a creditor has an allowed secured claim for the purchase price and require the debtor to either enter a reaffirmation agreement with the creditor pursuant to § 524(c) or redeem the property pursuant to § 722 within 45 days of the first meeting of creditors under § 341(a). *See* § 521(a)(6). If the debtor fails to reaffirm or redeem within the 45 day period, the stay terminates with respect to the property, except under the conditions stated in the statute. *Id.*

the further alternative of retaining property and remaining current on the debt, also referred to as the fourth option or the "ride-through" option.[13]

The Fifth Circuit adopted the reasoning of the Eleventh Circuit in *Taylor v. AGE Federal Credit Union (In re Taylor),* 3 F.3d 1512 (11th Cir. 1993), and held that debtors are limited to the three statutory options, stating that:

> [t]he clear language of Section 521(2) states that "the debtor *shall* file with the clerk a statement of his intention." Filing a statement of intention indicating that none of the three statutory alternatives are applicable, and failing otherwise to inform Sun of their intention is not in compliance with Section 521(2). This court adopts the reasoning of the Eleventh Circuit in *Taylor*, and holds that the debtors are limited to the three options set forth in the statute.

In re Johnson, 89 F.3d at 252.[14] After the decision in *Johnson,* courts remained split on the issue of whether a debtor was limited to the three options under § 521 or whether there was a fourth option of taking no action where debtors were current on payments to the secured creditor.[15]

Amendments enacted as part of BAPCPA made changes or additions to §§ 521 and 362 that affected the debtor's duties with regard to requirements for filing and performing in

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[13] *Compare Taylor v. AGE Fed. Credit Union (In re Taylor),* 3 F.3d 1512 (11th Cir. 1993), *and In re Edwards,* 901 F.2d 1383 (7th Cir. 1990), *with Home Owners Funding Corp. of Am. v. Belanger (In re Belanger),* 962 F.2d 345 (4th Cir. 1992) *and Lowry Fed. Credit Union v. West,* 882 F.2d 1543 (10th Cir. 1989).

[14] The Court held that if the debtors failed to notify the creditor of their intention to reaffirm, redeem or surrender within 10 days of the order, the case may be dismissed or discharge may be denied. *Id.*

[15] In *Sanabria v. American National (In re Sanabria),* 317 B.R. 59, 60 n.2 (B.A.P. 8th Cir. 2004), the court noted the disagreement among Circuit Courts:

> For cases recognizing the "fourth option" see, e.g., *Price v. Delaware State Police Fed. Credit Union (In re Price),* 370 F.3d 362 (3rd Cir.2004); *McClellan Fed. Credit Union v. Parker (In re Parker),* 139 F.3d 668 (9th Cir.1998); *Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow),* 126 F.3d 43 (2nd Cir.1997); *Home Owners Funding Corp. v. Belanger (In re Belanger),* 962 F.2d 345 (4th Cir.1992); *Lowry Fed. Credit Union v. West,* 882 F.2d 1543 (10th Cir.1989). For cases insisting on redemption, reaffirmation, or surrender, see, e.g., *Bank of Boston v. Burr (In re Burr),* 160 F.3d 843 (1st Cir.1998); *Johnson v. Sun Finance Co. (In re Johnson),* 89 F.3d 249 (5th Cir.1996); *Taylor v. AGE Fed. Credit Union (In re Taylor),* 3 F.3d 1512 (11th Cir.1993); *In re Edwards,* 901 F.2d 1383 (7th Cir.1990).

317 B.R. at 61; *see also* Rosemary Williams, Annotation, *Special Commentary: Performance and Interpretation of Debtor's Duties Regarding Retention or Surrender of Property of Bankruptcy Estate Encumbered by Consumer Debt Under 11 U.S.C.A. § 521(2),* 159 A.L.R. Fed. 521 (2000) (collecting cases).

accordance with the statement of intention.[16] One court has summarized changes to BAPCA as follows:

> Against this backdrop of conflict among the circuits on the efficacy of the ride-through option, in 2005, Congress passed BAPCPA. Section 521(2)(A) was re-designated as Section 521(a)(2)(A), and the statute was extended to encompass all debts, not just consumer debts; however, the language of the statute did not otherwise change. Rather, Congress enacted three other sections that appear to remove the ride-through option for *personal* property in those circuits that previously had allowed debtors to retain personal property without reaffirming or redeeming. First, the new Section 521(a)(6) specifically provides that a debtor shall not retain possession of personal property unless the debtor reaffirms or redeems. Second, the former Section 521(2)(C) was re-designated as Section 521(a)(2)(C) and was amended to clarify that nothing in Sections 521(a)(2)(A) or (B) altered the debtor's or trustee's property rights, *except as provided in Section 362(h).* (*Emphasis added.*) Third, the new Section 362(h) provides that the automatic stay terminates with respect to personal property if the debtor does not timely file a statement of intention or does not timely perform the stated intention by the statutory deadline. Now, debtors cannot retain *personal* property securing a debt anywhere in the country without first attempting to reaffirm the debt or to redeem the property.

In re Linderman, 435 B.R. 715, 716-17 (Bankr. M.D. Fla. 2009). The amendments, generally, require that with regard to personal property (on which a creditor has an allowed claim for the purchase price), a debtor may not retain possession unless she either enters a reaffirmation agreement pursuant to § 524(c) or redeems the property pursuant to § 722 within 45 days after the first meeting of creditors under § 341(a).[17]

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[16] The amendments included changes or additions to §§ 521(a)(2), 362(h)(1), 521(a)(6) and 521(d). *See Daimler Chrysler Fin. Servs. Ams. LLC v. Jones (In re Jones),* 397 B.R. 775, 783-87 (S.D. W. Va. 2008), *aff'd* 591 F.3d 308 (4th Cir. 2010) (general discussion of these amendments under BAPCPA). Amendments were also made to § 524 to encompass changes in requirements for reaffirmation agreements. A recent commentator noted that with the enactment of BAPCPA, Congress "retooled 11 U.S.C. § 524 to eliminate a 'fourth' option: the practice of debtors retaining possession of secured property and continuing to make monthly payments to the creditor for that property, yet not reaffirming the debt associated with that property. Modifying § 524 was Congress's attempt to force debtors to make a choice about their secured property: (1) surrender it, (2) reaffirm the debt or (3) redeem the property." Nicholas R. Grillot, *Disfavoring Reopening of Cases to Enter Reaffirmation Agreements,* 32 MAR Am. Bankr. Inst. J. 39, 39 (2013).

[17] *See* § 521(a)(6); *In re Sanders,* No. 11-51240, 2012 WL 692549, at *1 n. 1 (Bankr. W.D. Tex. Mar. 2, 2012) (post-BAPCPA, courts have found ride through for personal property was clearly eliminated by §§ 521(a)(6) and 362(h)); *In re Harris*, 421 B.R. at 599 ("BAPCPA added 11 U.S.C. § 521(a)(6) and § 362(h) which clearly eliminated the 'ride through' for personal property."); *but see In re Jones*, 397 B.R. at 785 ("The controversy has

The BAPCPA amendments did not, however, address duties of the debtor under § 521 with regard to real property.[18] Courts remain divided regarding what is required of debtors under this section.[19] In *Habersham Bank v. Harris (In re Harris)*, 421 B.R. 597 (Bankr. S.D. Ga. 2010), the bankruptcy court addressed whether "Congress' silence as to real property allows a chapter 7 debtor to retain real property without reaffirming the debt." 421 B.R. at 599. The court reasoned that because Congress is presumed to be aware of judicial interpretations of statutes, and because the language of the revised statute is identical to the language interpreted by the Eleventh Circuit in *Taylor*, "[s]ection (a)(2) still applies to 'debts which are secured by property of the estate' which includes real and personal property." *Id* at 599-600; *see also In re Linderman*, 435 B.R. at 718 (*Taylor* still applicable until Eleventh Circuit rules otherwise).

When the Fifth Circuit rendered its decision in *Johnson* (holding that debtors had three options – to either reaffirm, redeem or surrender), it expressly adopted the reasoning of the Eleventh Circuit in *Taylor*.[20] The logic and rationale of *Johnson* and *Taylor* are applicable to the facts before the Court; and, *Johnson* is still controlling law until the Fifth Circuit holds

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intensified after BAPCPA, with courts questioning whether the 'ride-through' option could have survived the changes to the Code"); Christopher M. Hogan, *Will the Ride-Through Ride Again?*, 108 Colum. L. Rev. 882, 882 (2008) (note explores whether BAPCPA eliminated ride-through suggesting that "courts should continue to perform the ride-through based on the pre-BAPCPA circuit split until Congress makes a clear change to the Bankruptcy Code").

[18] "BAPCPA essentially is silent as to whether a debtor is required to either reaffirm or redeem real property." *In re Linderman*, 435 B.R. at 718.

[19] *See In re Linderman*, 435 B.R. at 718 (court acknowledges split still exists as to real property collateral); *In re Caraballo*, 386 B.R. 398, 401 (Bankr. D. Conn. 2008) ("Code §§ 521(a)(6) and 362(h) abrogated the ride through option as it pertains to personal property. However, courts have concluded that the ability of a debtor to choose the ride through option as it relates to real property was not abrogated by BAPCPA"); David M. Holliday, Annotation, *Availability and Use of Bankruptcy "Ride Through" Option After Enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)*, 68 A.L.R. Fed. 2d 513 (2012) (summary includes section on "Debts Secured by Real Property" divided into two subsections; one with summaries of decisions that have held that the ride through option is available for debts secured by real property after enactment of BAPCPA, and one with decisions that have held that the ride through option is not available for debts secured by real property after enactment of BAPCPA).

[20] *Johnson*, 89 F.3d at 252 ("This Court adopts the reasoning of the Eleventh Circuit in *Taylor*, and holds that the debtors are limited to the three options set forth in the statute.").

otherwise.[21] Consequently, the Debtor must reaffirm, redeem or surrender the Property. No ride-through option is available.

IV. CONCLUSION

Under the facts of this case, the Court is bound by the ruling of the Fifth Circuit in *Johnson* and finds that the Debtor must either reaffirm the debt with Hancock under § 524(c), redeem the collateral under § 722 or surrender the property. Therefore, Hancock's Motion should be granted and the Debtor should be compelled to comply with § 521(a)(2). The Court finds that the Debtor should be given 14 days to file an amended Statement of Intention and perform in accordance therewith. If the Debtor fails to comply with these requirements, the Debtor's case may be dismissed, discharge may be denied, or other action may be taken. Further, Hancock's request to delay entry of discharge should be granted until such time that the Debtor complies with the Court's direction herein.[22]

IT IS THEREFORE ORDERED that the Motion is **GRANTED.**

IT IS FURTHER ORDERED that Jeanfreau is granted 14 days to file an amended Statement of Intention in accordance with the Court's Memorandum Opinion and Order and to perform in accordance with her amended Statement of Intention with respect to the Property.

IT IS FURTHER ORDERED that the entry of the Debtor's discharge is delayed until such time as she complies with the Court's directions herein.

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[21] "[T]his court has no authority to 'overrule' the Fifth Circuit. Only the circuit itself can overrule its own precedents." *Mann Bracken, LLP v. Powers (In re Powers)*, 421 B.R. 326, 335 (Bankr. W.D. Tex. 2009) (*citing In re Orso*, 214 F.3d 637, 641 n.5 (5th Cir. 2000), *rev'd on other grounds on rehearing en banc*, 283 F.3d 686 (5th Cir. 2002); *ASARCO LLC v. Baker Botts, L.L.P. (In re ASARCO LLC)*, 477 B.R. 661, 670 (S.D. Tex. 2012) (district courts are bound by the law of their circuit).

[22] *See* Fed. R. Bankr. P. 4004(j) (allowing for delay of discharge where motion for enlargement of time to file reaffirmation agreement under Rule 4008(a) is pending); Fed. R. Bankr. P. 4008(a) (providing that the court may enlarge time to file reaffirmation agreement at any time and in its discretion).

IT IS FURTHER ORDERED that request for attorney's fees is denied.

SO ORDERED.

Katharine M. Samson
United States Bankruptcy Judge
Dated: June 12, 2013