

In the United States Bankruptcy Court
for the
Southern District of Georgia
Waycross Division

In the matter of:

KAY DEE CARVER

Debtor

KAY DEE CARVER

Movant

v.

TRUST COMPANY BANK
OF COFFEE COUNTY

Respondent

Chapter 7 Case

Number 92-50289

FILED

at 2 O'clock & 52 min. P.M.

Date 2/9/93

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *JB*

MEMORANDUM AND ORDER
ON MOTION TO COMPEL REAFFIRMATION

Debtor filed a Motion to Compel Reaffirmation on December 28, 1992. A hearing was held on the Motion on January 12, 1993. After consideration

of the evidence presented at the hearing and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor originally filed a Chapter 13 petition on May 26, 1992. However, Debtor was forced to convert to Chapter 7 as the amount of claims filed exceeded the debt limits for Chapter 13. A Chapter 7 petition was filed on November 2, 1992, and an order converting the case to a Chapter 7 was entered on the same date.

Debtor filed with her petition a statement of intention declaring her intent to retain a 1987 Mercedes Benz automobile and to reaffirm the debt on the vehicle. No reaffirmation agreement has been filed with the court.

On December 28, 1992, Debtor filed a Motion to Compel Reaffirmation. Debtor alleged in the motion that Respondent, Trust Company Bank of Coffee County, had refused to allow Debtor to reaffirm the debt on her automobile. Debtor further alleged that she was current with her payments to the

creditor and maintained full insurance coverage on the vehicle.

A hearing was held on the Motion on January 12, 1993. Debtor appeared and was represented by counsel. A bank official appeared, but was not represented by counsel. The court heard Debtor's testimony; however, the bank official was not allowed to examine the Debtor under oath as he was not represented by an attorney.

Debtor proved to the court that the automobile was essential to her reorganization. Formerly, Debtor was in the real estate business with her husband. Debtor is now divorced and needs the automobile to go to and from college where she is attending nursing school.

Debtor testified that she is now current on her obligation to pay for the car although she was somewhat behind in her payments at the time she filed her Chapter 13 petition. Debtor argued that the bank refused to cooperate with her and that certain bank officials, relatives of the Debtor, were angry with her due to problems arising out of other business deals.

CONCLUSIONS OF LAW

Section 521(2) of the Bankruptcy Code provides as follows:

(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. §521(2). The majority of courts interpreting this section conclude that Section 521 is a notice provision which allows the debtor to retain property and keep payments current, retain and affirm, retain and redeem, or surrender. Lowery Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989); Home Owners Funding Corp. v. Belanger (In re Belanger), 962 F.2d 345 (4th Cir. 1992); In re Taylor, 146 B.R. 41 (M.D.Ga. 1992); In re Shubert, 147 B.R. 618 (Bankr. N.D.GA. 1992). However, the minority has concluded that a debtor may only reaffirm, redeem, or surrender. Matter of Edwards, 901 F.2d 1383 (7th Cir. 1990); Bank South N.A., v. Horne, 132 B.R. 661 (Bankr. N.D.Ga. 1991).

I choose to follow the majority view that a Debtor may retain the collateral and keep payments current without reaffirming a debt. However, if a debtor chooses to reaffirm, both the debtor and creditor must reach an agreement. The court cannot force a party, either a debtor or a creditor, to enter into a reaffirmation agreement without the party's consent. In re Danley, 131 B.R. 193, 194 (Bankr. N.D.Fla. 1991); In re Nikokyrakis, 109 B.R. 260 (Bankr. N.D.Ohio 1989); In re Peacock, 87 B.R. 657, 660 (Bankr. D.Colo. 1988).

The only exception to the general requirement of a creditor's consent

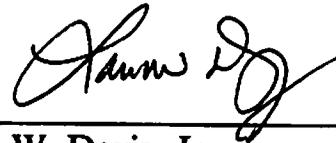
to reaffirm is found in Nikokyrakis, cited by the Debtor, where the court applied equitable estoppel to prevent the creditor from denying the existence of a valid reaffirmation agreement. In Nikokyrakis, the creditor tendered to the debtor a reaffirmation agreement at the meeting of creditors. Debtor signed the agreement and relied on the bank's assertion that the debtor could reaffirm the debt. The bank did not inform the debtor that the reaffirmation agreement would not be honored until after debtor's discharge. The court concluded that it could not imagine more inequitable conduct than this case where the bank refused to reaffirm although there had been no material default by the debtor. 109 B.R. at 263.

In the case at bar, the creditor has refused at all times to enter into a reaffirmation agreement with Debtor. I cannot compel the reaffirmation and must deny Debtor's motion in light of the creditor's lack of consent. However, considering the evidence before me I cannot conclude that Debtor must redeem or surrender the property as the Debtor has the option to keep the collateral and keep payments current. A discharge will extinguish Debtor's personal liability on the note although the creditor may later enforce its lien, which survives bankruptcy, upon a future default. Shubert, 147 B.R. at 619; Peacock, 87 B.R. at 659-60.

Debtor testified that she was current in her payments on the automobile; however, the bank official asserted that the automobile secured other notes, which were in arrears. Debtor disputed this assertion. The bank failed to introduce any evidence to show that Debtor was in default in her obligations or that the automobile secured other debts. Nevertheless, the court must deny Debtor's Motion to Compel Reaffirmation. The bank may file a motion for relief from the automatic stay if Debtor is not current on any obligations secured by the vehicle.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor's Motion to Compel Reaffirmation is denied. Debtor is entitled to keep the property and maintain payments on the obligation secured by Respondent's collateral.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 8th day of February, 1993.