

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
EILEEN RUTH LAUER,) CASE NO. 02-33739 HCD
) CHAPTER 7
)
DEBTOR.)

Appearances:

Stephen G. Drendall, Esq., attorney for debtor, 218 West Washington Avenue, Suite 400, Tower Building, South Bend, Indiana 46601;

Brooks J. Grainger, Esq., attorney for creditor, P.O. Box 6200, South Bend, Indiana 46660; and

Elizabeth B. Alphin, Esq., attorney for creditor, Mapother & Mapother, PSC, 801 West Jefferson Street, Louisville, Kentucky 40202.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 28, 2003.

Before the court are a Reaffirmation Agreement between the debtor Eileen Ruth Lauer (“debtor”) and DaimlerChrysler Services North America, LLC (“creditor”), the debtor’s Notice of Rescission of Reaffirmation Agreement, and the Creditor’s Objection to Rescission of Reaffirmation Agreement. After conducting a trial on the issue on March 3, 2003, the court took the matter under advisement.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) and § 1757(b)(2)(O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required

by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The underlying facts are not in dispute. The debtor filed her voluntary chapter 7 bankruptcy petition on June 28, 2002. Among her debts was one due to DaimlerChrysler Services North America, LLC, in the amount of \$6,380.34 plus interest. On August 9, 2002, the creditor filed its motion for relief from the stay. The 341 meeting was held on September 4, 2002, and the trustee's no-asset no-distribution report was filed on September 6, 2002. Six days later, the court granted the creditor's motion for relief from the stay and allowed the vehicle to be abandoned to the creditor. *See* R. 12 (Order of September 12, 2002).

The debtor reaffirmed three debts. She filed reaffirmation agreements with Conseco Finance Servicing Corporation and MFB Financial on September 6, 2002. She also executed a reaffirmation agreement with DaimlerChrysler on September 4, 2002; it was filed in the court on September 24, 2002.¹ *See* R. 14. The Reaffirmation Agreement waived her discharge of that debt to DaimlerChrysler. It included the following statement:

This Agreement may be rescinded by Debtor at any time prior to discharge or within sixty days after it is filed with the court, whichever occurs later, by giving notice of rescission to Creditor.

R. 14, ¶ 2. The debtor made a regularly scheduled payment of \$251.84 to the creditor on October 11, 2002.

The debtor was discharged and the case was closed October 15, 2002. The time period for her to rescind the Reaffirmation Agreement with the creditor expired on the sixtieth day after the filing, November 23,

¹ The creditor sent debtor's counsel two versions of the reaffirmation agreement. The debtor chose one, signed it and sent it back to the creditor. The creditor received the signed agreement on September 20, 2002; it signed the agreement, as well, and sent it to the bankruptcy court for filing. The agreement was filed September 24, 2002. The creditor did not send a copy of the signed, filed reaffirmation agreement to the debtor.

2002. However, since that day was a Saturday, the debtor could have filed the rescission on November 25, 2002. However, the debtor filed her Notice of Rescission of Reaffirmation Agreement on November 27, 2002. The notice stated that she had rescinded the agreement and was abandoning the collateral to the creditor. The creditor took possession of the vehicle in December 2002.

Discussion

Before turning to the matters raised by the parties, the court notes that the debtor's rescission notice and the creditor's objection were filed after the debtor had been discharged and the case was closed. Neither party has requested a reopening, in spite of the fact that the notice of rescission was stricken because the case had not been reopened. Because this court closed the case, it has the authority, if it chooses to exercise it, to reopen it sua sponte "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b); *See Donaldson v. Bernstein*, 104 F.3d 547, 552 (3d Cir. 1997); *In re Bruzzese*, 214 B.R. 444, 449 (Bankr. E.D.N.Y. 1997) (citing cases).² On the other hand, a court "need not reopen a bankruptcy case where reopening would not result in a 'sensible allocation of judicial resources,' *In re Yoder Co.*, 158 B.R. 99, 101 (Bankr. N.D. Ohio 1993), or where reopening would have no effect." *In re Booth*, 242 B.R. at 916 (citing *Zirnhelt v. Madaj* (*In re Madaj*), 149 F.3d 467, 472 (6th Cir. 1998)). As my Illinois colleague, United States Bankruptcy Judge John H. Squires, recognized, "the interests of justice and the merits of the dispute militate in favor of the court exercising its authority under 11 U.S.C. § 350(b)." *In re Johnson*, 148 B.R. 532, 537 (Bankr. N.D. Ill. 1992). In its discretion, the court sua sponte reopens this case solely to address the rescission issue raised herein.

In this case, the debtor seeks to rescind her reaffirmation agreement with the creditor and the creditor objects to the rescission on the ground that the debtor failed to execute a timely rescission. The issues argued

² *See also* 11 U.S.C. § 105(a), which provides that the court is not precluded "from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process"; Fed. R. Bankr. P. 5010, which provides that a case "may be opened on motion of the debtor or other party in interest pursuant to § 350(b)."

by the parties are legal ones. DaimlerChrysler first asserts that the bankruptcy court does not have jurisdiction to allow the rescission of the debtor's reaffirmation agreement with the creditor. In the alternative, it contends that the debtor cannot rescind the reaffirmation agreement outside the time period allowed by 11 U.S.C. § 524(c)(4). It is the debtor's position that there is an equitable tolling of the rescission period that allows her to rescind the reaffirmation agreement outside the allotted statutory time period.

The Bankruptcy Code allows a debtor to enter into reaffirmation agreements that legally bind him or her to pay pre-petition debts. *See In re Turner*, 156 F.3d 713, 717-18 (7th Cir. 1998) ("A reaffirmation agreement is the only vehicle through which a dischargeable debt can survive a Chapter 7 discharge."). However, the Code also protects a debtor from compromising "the fresh start that the discharge of indebtedness is intended to give the debtor," *id.*, by making unwise agreements to repay dischargeable debts. *See also Jamo v. Katahdin Federal Credit Union (In re Jamo)*, 283 F.3d 392, 397-98 (1st Cir. 2002) ("Although reaffirmation is consensual in nature, the myriad safeguards erected by Congress reflect its recognition that a debtor's decision to enter into a reaffirmation agreement is likely to be fraught with consequence."). To protect a debtor, § 524(c) sets forth certain prerequisites for reaffirmation agreements. The section "is explicit that such an agreement is enforceable only if all the statutory conditions, including filing, are satisfied." *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 912 (7th Cir. 2001). Of relevance in this case is the subsection of § 524 that allows the debtor to rescind:

§ 524(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 an extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if —

...

(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.

11 U.S.C. § 524(c)(4).

In this case, the court has examined the reaffirmation agreement and finds that it satisfies the general criteria of § 524(c). *See In re Turner*, 156 F.3d at 718. It was made and filed with the court before the discharge was granted. *See* § 524(c)(3). It included a clear and conspicuous statement that the agreement was not required under bankruptcy or nonbankruptcy law and that the debtor had the right to rescind at any time before the discharge or within sixty days after the agreement is filed, whichever is later. *See* § 524(c)(4). It was accompanied by an affidavit, executed by the debtor's attorney, attesting that the agreement was informed and voluntary and did not impose an undue hardship on the debtor. The affidavit also declared that the debtor was represented by counsel and was fully advised of the legal consequences of the reaffirmation agreement. The agreement was signed by the debtor, her attorney, and counsel for the creditor. The court further determines that the agreement is one to which both parties consented after a fully voluntary negotiation. *See In re Turner*, 156 F.3d at 718-19 (requiring "an expression of mutual assent," rejecting a unilateral statement of reaffirmation because it "cannot be understood as the mutual 'agreement' that the statute requires"). The court concludes that this debt was reaffirmed in compliance with the statute. It now considers whether it was properly rescinded.

A. *The Court's Jurisdiction*

Considering first the creditor's jurisdictional challenge, this court determines that jurisdiction does lie to hear the creditor's objection to the debtor's notice of rescission. Bankruptcy courts have jurisdiction to consider civil proceedings that "arise under" Title 11, including such core matters as the effect, under § 524, of a debtor's discharge on post-bankruptcy disagreements. *See* 28 U.S.C. § 1334; *In re Kewanee Boiler Corp.*, 270 B.R. 912, 916-18 (Bankr. N.D. Ill. 2002) (finding that the bankruptcy court had jurisdiction to review alleged § 524 violations, noting that the issues to be determined during the litigation did not detract from the court's jurisdiction to determine the application, reach and effect of § 524(a)(2)). They have jurisdiction to determine the validity of reaffirmation agreements. *See* § 1334(b); *Booth v. National City Bank (In re Booth)*, 242 B.R. 912, 915 (6th Cir. B.A.P. 2000) (citing cases). The Seventh Circuit has agreed with the First and Sixth Circuit Courts of

Appeals that “remedies against debt-affirmation agreements contended to violate the Bankruptcy Code are a matter exclusively of federal bankruptcy law.” *Cox*, 239 F.3d at 913 (affirming bankruptcy court’s jurisdiction to reopen in order to review a request for rescission long after the debtor had been discharged, his bankruptcy case had been closed, and the debt had been reaffirmed and paid in full). In particular, “[a] post-discharge motion that seeks a ruling on the effect of an alleged reaffirmation agreement is a proceeding that arises under Title 11.” *In re Grabinski*, 150 B.R. 427, 432 (Bankr. N.D. Ill. 1993); *see also Torgenrud v. Missoula Fed. Credit Union (In re Reinertson)*, 224 B.R. 137, 148 (Bankr. D. Mont. 1998) (concluding that the debtors’ claim to rescind and the creditors’ claims to enforce the reaffirmation agreements are core proceedings affecting the adjustment of the debtor-creditor relationship under § 157(b)(2)(O)), *rev’d in part on other grounds*, 241 B.R. 451 (9th Cir. B.A.P. 1999); *801 Credit Union v. Heller (In re Heller)*, 123 B.R. 782, 783 (Bankr. S.D. Ohio 1991) (finding that request for extension of time in which to file reaffirmation agreement was core proceeding). The court finds, therefore, that the debtor’s Reaffirmation Agreement and Notice of Rescission of Reaffirmation Agreement, along with the Creditor’s Objection to Rescission of Reaffirmation Agreement, are within its core jurisdiction.

B. *Rescission under 11 U.S.C. § 524(c)(4)*

The creditor offered an alternative theory in its objection to the debtor’s rescission. It suggested that the debtor cannot rescind the reaffirmation agreement outside the time period allowed by § 524(c)(4).

A reaffirmation agreement is “an agreement to re-embrace a pre-existing debt that would otherwise be discharged in bankruptcy.” *In re Turner*, 156 F.3d at 720. As the court noted above, § 524(c) protects the debtor by assuring that the reaffirmation agreement is voluntary and not coerced by the creditor. It allows the debtor even to rescind the reaffirmation agreement unilaterally, as long as the debtor gives the creditor notice of the rescission within the statutory time period. Because the reaffirmation agreement is a contract, the parties are free to negotiate its terms. *See id.* at 718-19 (construing reaffirmation agreements strictly, based on conventional

contract principles). For example, the parties might have included a provision that the rescission be tendered in writing. “[S]uch a provision protects the creditor and debtor from any potential misunderstanding that might arise regarding the debtor’s alleged verbal rescission and is therefore to be encouraged.” *In re Booth*, 242 B.R. at 916. However, the parties’ agreement in this case required only that the rescission be timely. It contained the statutory language that rescission be made prior to discharge or within sixty days after filing, whichever is later. The debtor failed to rescind within the allotted time period.

The court finds that, since the rescission was not made prior to discharge or within the sixty-day time period, the agreement became a final, enforceable contract that was legally binding on the debtor. *See In re Curcio*, 242 B.R. 192, 192 (Bankr. S.D. Fla. 1999); *In re Saunders*, 169 B.R. 192, 195 (Bankr. W.D. Mo. 1994); *In re McCreless*, 141 B.R. 223, 224 (Bankr. N.D. Fla. 1992); *In re Davis*, 106 B.R. 701, 704 (Bankr. S.D. Ala. 1989); *see also* “*Debtors Beware: Reaffirmation Agreements Can Be Hard to Rescind*,” 20-MAR Am. Bankr. Inst. J. 10 (March 2001) (citing *Saunders*). This court, like the courts deciding *Saunders* and *Booth*, finds that the reaffirmation agreement was valid and that the rescission, which was untimely executed, was unenforceable. For that reason, the reaffirmation agreement remains in effect. *Cf. In re Brinkman*, 123 B.R. 611, 612 (Bankr. N.D. Ind. 1991) (denying debtors’ motion to file reaffirmation agreements post-discharge on ground that they were untimely, unenforceable and of no legal significance).

C. Equitable Tolling

The debtor acknowledged that the rescission was filed after her discharge and after the sixty-day deadline set forth in the statute and in the reaffirmation agreement. However, she claimed that the rescission period should be equitably tolled to allow her to rescind the reaffirmation agreement outside the time period allowed by § 524(c)(4). Recognizing that some courts have allowed untimely rescissions in limited situations, *see* “*Debtors Beware*,” 20-MAR Am. Bankr. Inst. J. 10, this court conducted a hearing to determine whether it

should invoke its equitable powers under the Bankruptcy Code to allow a late rescission of the reaffirmation agreement.

The debtor first asserted that she did not receive a file-marked copy of the reaffirmation agreement after it was filed by the creditor with the court. However, she testified that she knew it had been filed in September sometime. Moreover, she made a regularly scheduled payment to the creditor on October 11, 2002, as was called for by the agreement, and clearly intended to comply with the agreement, since she wanted to hold onto the vehicle. As the Seventh Circuit Court of Appeals commented, “The debtor or his lawyer could have found out by a simple inquiry whether the agreement had been filed, had either of them thought that important, as doubtless neither did, since the debtor wanted to honor the agreement even though not legally obligated to.” *Cox*, 239 F.3d at 915. In fact, in this case, the debtor’s attorney did inquire. He sent a fax to the creditor’s attorney on September 19, 2002, asking him to confirm receipt of the reaffirmation agreement. Counsel for the creditor returned the fax on September 20, 2002, with the signed notation “We got it. Not filed yet. Will be filed.”) Cr. Ex. 4. The court finds that the debtor knew the agreement had been filed and could have calculated the time period within which to rescind.

The debtor also claimed that, pursuant to Rule 5 of the Federal Rules of Civil Procedure, the creditor was required to serve on the debtor the reaffirmation agreement it filed with the court.³ Because it did not, the debtor asserted, she did not know whether an agreement had been reached and when the period to rescind had begun. The court finds this argument unpersuasive. First, as was noted above, the debtor knew that the agreement had been reached and would be filed. Second, she provided no case law — and the court found none

³ Rule 5 of the Federal Rules of Civil Procedure provides, in pertinent part:

(a) Service: When required . . . [E]very order required by its terms to be served, every pleading subsequent to the original complaint . . . , every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

— stating that a reaffirmation agreement required service. Third, the debtor did not demonstrate – and the court did not find – that the reaffirmation agreement between the parties is an order, pleading, paper relating to discovery, or any of the other types of papers required to be served under Rule 5. Nor is it a paper required to be filed under Federal Rule of Bankruptcy Procedure 5005 or any other bankruptcy rule. The court determines that there is no service requirement for reaffirmation agreements. A glance at the public docket, through the electronic case filing system or at the court house, or a further inquiry by the debtor or her attorney, was all that was needed here. The debtor’s argument of inadequate notice is unavailing.

The debtor contended, as well, that equitable tolling is appropriate in this case because it was necessary to avoid a financial hardship on the debtor, who could not afford to pay for the car the creditor has repossessed. She testified at trial that she had changed her mind about her DaimlerChrysler vehicle and decided to buy another car after she received her discharge. If she must make two car payments now, she argued, she would be denied the fresh start promised in bankruptcy and the creditor would receive a windfall.

The rescission period of § 524(c)(4) protects a debtor by providing a way out of a valid agreement, even if she enters into it voluntarily. The statute allows a debtor, within the statutory time period, the opportunity to reconsider the decision to reaffirm and to choose to rescind the agreement. Nevertheless, § 524 “is not wholly debtor-oriented.” *In re Turner*, 156 F.3d at 720. The case law uniformly holds that, when a debtor chooses not to rescind a reaffirmation agreement within the time granted by the Bankruptcy Code, the agreement becomes enforceable to the same extent as if the debtor had never filed bankruptcy “and the creditor [will] have the right not only to pursue its collateral, but to pursue the debtor for any deficiency on its loan balance after credit for the value of the collateral.” *Id.* at 717-18 (quoting *In re Turner*, 208 B.R. 434, 438 (Bankr. C.D. Ill. 1997)); see also *Schott v. WyHy Fed. Credit Union (In re Schott)*, 282 B.R. 1, 6 (10th Cir. B.A.P. 2002); *Ripple v. Boston Whaler Fin’l Servs., Inc. (In re Ripple)*, 242 B.R. 60, 64 (Bankr. M.D. Fla. 1999).

Moreover, courts have rejected a debtor's request to rescind a reaffirmation agreement after the time period, even when the debtor's financial circumstances have changed and continued performance under the agreement would impose an undue hardship on the debtor. See *In re Curcio*, 242 B.R. at 192; *In re McCreless*, 141 B.R. at 224; *In re Davis*, 106 B.R. at 704. "Generally speaking, the courts will only allow a reaffirmation to be rescinded after the statutory time period when there has been a mutual mistake." "*Debtors Beware*," 20-MAR Am. Bankr. Inst. J. at 10 (citing *In re Beaton*, 211 B.R. 755 (Bankr. N.D. Ala. 1997)). The debtor has not made such a claim in this case and the court cannot find that there was a mistaken belief on the part of the parties. The debtor testified that she had second thoughts about keeping the vehicle (a Dodge Neon) and decided she wanted another vehicle (a Dodge Intrepid). She testified that she knew in September 2002 that the reaffirmation agreement had been filed, and yet she purchased another vehicle before rescinding the original agreement. It is noteworthy that the reaffirmation agreement incorporates the declaration of the debtor's attorney that the agreement "does not impose an undue hardship on Debtor or a dependent of Debtor." R. 14 at 2. These circumstances do not provide a sufficient legal basis to set aside a valid reaffirmation agreement; nor do they justify the court's exercise of its equitable powers to allow the late rescission to avoid a financial hardship. The court finds that the debtor could have rescinded the agreement within sixty days of filing the agreement with the court. "After sixty days, however, debtors are bound by the agreement." *In re Saunders*, 169 B.R. at 195 (citing *In re Grabinski*, 150 B.R. 427, 431 (Bankr. N.D. Ill. 1993)).

Conclusion

For the reasons stated above, the court sua sponte reopens this case solely to address the rescission issue raised herein. It finds that the reaffirmation agreement between the debtor and creditor is a valid, enforceable agreement that satisfied the requirements of 11 U.S.C. § 524(c). However, because the debtor's notice of rescission was not given to the creditor prior to discharge or within sixty days of the agreement's filing

with the court, as required by § 524(c)(4), the court finds that the notice was improperly executed and now is ineffective to set aside or rescind the reaffirmation agreement. The court also finds that the debtor provided no evidence upon which to justify an equitable tolling of the statutory time period. The rescission being unenforceable, the court determines that the reaffirmation agreement remains in effect. Accordingly, the Creditor's Objection to Rescission of Reaffirmation Agreement, filed by DaimlerChrysler Services North America LLC, is sustained.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT