

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-34682

DONNA LUCIENE SMITH
JOE SCOTT SMITH

Debtors

MEMORANDUM ON REAFFIRMATION AGREEMENTS

APPEARANCES: Donna Luciene Smith
Joe Scott Smith
102 Bella Gardens
Middlesboro, Kentucky 40965
Debtors, *pro se*

National City Bank
Post Office Box 856153
Louisville, Kentucky 40285
National City Bank Consumer Loan Services
Post Office Box 1740 Loc R-K01-D3
Southgate, Michigan 48195
Secured Creditor

Ann Mostoller, Esq.
136 South Illinois Avenue
Suite 104
Oak Ridge, Tennessee 37830
Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Before the court are Reaffirmation Agreements (Agreements) signed by the Debtors and National City Bank. The Debtors were not represented by an attorney during the course of negotiating the Agreements. The court, after a hearing held pursuant to 11 U.S.C.A. § 524(d) (West 1993 & Supp. 2001) on January 31, 2002, cannot, for reasons hereinafter discussed, approve the Agreements.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(O) (West 1993).

I

The Debtors, acting *pro se*, filed the Voluntary Petition commencing their Chapter 7 case on September 24, 2001. They negotiated Agreements with National City Bank Ohio and National City Bank Kentucky (collectively, National City Bank) to reaffirm obligations in the amounts of \$6,449.28 and \$5,604.33, respectively. The Agreements, two of which are dated December 17, 2001, were filed on December 26, 2001. A third Agreement, filed January 22, 2002, is undated but appears identical to one of the previously-filed Agreements.¹ All three Agreements recite in material part:

Debtor[s] hereby reaffirm[] indebtedness due Creditor, as evidenced by Security Agreement, which [is] attached hereto and incorporated herein.

¹ Notwithstanding the duplication, the court will consider all three Agreements in its forthcoming discussion.

There is no Security Agreement attached to any of the three Agreements nor does any Agreement contain a description of the collateral securing the obligations the Debtors seek to reaffirm.²

Because the Debtors negotiated the Agreements without an attorney, the court, as required by 11 U.S.C.A. § 524(d), entered an Order on January 8, 2002, directing the Debtors to appear for a hearing on January 31, 2002. This Order also directed the Debtors and National City Bank to appear on the same date to show cause why the Agreements should not be declared nonbinding and unenforceable because they are incomplete [in] that they do not contain the Security Agreements referred to as part of their terms.” The Debtors appeared for the hearing, National City Bank did not.

At the January 31, 2002 hearing, the Debtors testified that the loans are secured by the 1997 Ford Taurus and 1996 Toyota Camry automobiles listed in Schedule D to their petition. The Debtors also testified as to their present financial condition and the court requested that they file amended Schedules I and J to reflect their current income and expenses. Amended schedules were filed on February 11, 2002. The Agreements have not, however, been amended to include the Security Agreements evidencing the Debtors’ obligations to National City Bank which presumably also describe the collateral securing the obligations.³

² As Schedule D to their petition, the Debtors list two obligations to National City Bank: one they list as secured by a 1997 Ford Taurus and the other as secured by a 1996 Toyota Camry.

³ The court told the Debtors at the January 31, 2002 hearing that it would not approve the Agreements unless the Security Agreements were filed.

II

Reaffirmation is a voluntary postpetition agreement between a debtor and a creditor. See *In re Pendlebury*, 94 B.R. 120, 122 (Bankr. E.D. Tenn. 1988). Because it “envisions the retention of debt beyond discharge it is to some extent inconsistent with the fresh-start provisions of Chapter 7.” *Id.* at 125. Short of formally reaffirming a debt, a debtor may voluntarily continue to pay a creditor, without obligation. See *id.* at 121 n.2; 11 U.S.C.A. § 524(f) (West 1993).

Reaffirmation involves, or should involve, renegotiation of the debt, and the terms of the reaffirmation agreement may be different from the original contract terms. See *Pendlebury*, 94 B.R. at 124. Debtors have some degree of bargaining power in reaffirmation. See *id.* at 125. In the absence of reaffirmation, a creditor’s claim is discharged, leaving recourse against the collateral as its sole remedy. See *id.* Reaffirmation restores a creditor’s ability to seek recourse against the debtor personally as well as through repossession. See *id.* The creditor benefits by maintaining an existing security interest and an “uninterrupted stream of payments.” *Id.* In addition, by reaffirming a debt, a debtor spares the creditor the expenses associated with repossession and foreclosure of collateral. See *id.* The creditor also avoids having to consider the resale value of the collateral, which could be uncertain. See *id.*

Bankruptcy Code § 524(c) authorizes reaffirmation and specifies certain requirements which must be met before a reaffirmation agreement may become valid. See *id.* at 122; 11 U.S.C.A. § 524(c) (West 1993 & Supp. 2001). In the present case, where the Debtors have negotiated the Agreements without the benefit of counsel, § 524(c)(6) applies. That subdivision provides in

material part that a reaffirmation agreement is enforceable only if it is approved by the court as (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and (ii) in the best interest of the debtor.” 11 U.S.C.A. § 524(c)(6).

A reaffirmation agreement imposes an undue hardship on the debtor where it would result in a significant, but otherwise avoidable, obstacle to the attainment or retention of necessities by the debtor or the debtor’s dependents.” *In re Melendez*, 224 B.R. 252, 261 (Bankr. D. Mass. 1998). When determining whether a reaffirmation imposes an undue hardship, there are several relevant factors which a court may consider, including the terms of the debt to be reaffirmed, whether the goods that the debtor wishes to retain are necessary, the risk of repossession if the debtor decides not to reaffirm the debt, and the replacement value of the goods compared to the amount of debt to be reaffirmed. *See id.*

The Debtors have testified that one vehicle is being driven by their daughter who is away at school and that she is making the payments. They testified that they require the second vehicle for their personal transportation and that payments are current.

The court must disapprove the Agreements because they do not contain the Security Agreements incorporated into their terms. The Agreements are therefore incomplete. The court cannot assess the impact on the Debtors of the obligations they propose to reaffirm nor can it even determine whether National City Bank is properly secured.

The court’s January 8, 2002 Order required the Debtors and National City Bank to appear and show cause why the Agreements should not be declared nonbinding and unenforceable

because they are incomplete. Additionally the Debtors were advised at the January 31, 2002 hearing that the Agreements would not be approved unless the Security Agreements were submitted. The court has afforded the Debtors and National City Bank ample opportunity to provide the Security Agreements. They have not done so. The Agreements will accordingly not be approved.⁴

An appropriate order will be entered.

FILED: March 6, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁴ As noted, the Debtors may continue to make voluntary payments on their obligations to National City Bank notwithstanding that the court has not approved the Agreements. See 11 U.S.C.A. § 524(f). As long as the Debtors maintain the appropriate insurance protecting National City Bank's interest and continue their monthly payments, perhaps National City Bank will allow the Debtors to retain possession of the vehicles.

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ORDER

For the reasons stated in the Memorandum on Reaffirmation Agreements filed this date, the court directs that the Reaffirmation Agreements signed by the Debtors and National City Bank Kentucky and National City Bank Ohio dated December 17, 2001, which were filed on December 26, 2001, and the undated Reaffirmation Agreement signed by the Debtors and National City Bank Ohio, which was filed on January 22, 2002, are not approved. The Reaffirmation Agreements are nonbinding and unenforceable by any party.

SO ORDERED.

ENTER: March 6, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE