UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE: **BK. NO. 91-21686**

ARTHUR STAMP, **CHAPTER 7**

Debtor. **DECISION AND ORDER**

BACKGROUND

This matter is before the Court on the Debtor's request to reopen a Chapter 7 bankruptcy case in order to allow him to reaffirm a debt under Section 524(d) of the Bankruptcy Code.

On June 12, 1991 Arthur Stamp (the "Debtor") filed a petition initiating a Chapter 7 case. At the time of the filing of his petition, the Debtor owed $13,862.39 to Elmira Savings Bank (the "Bank") which was secured by a mortgage on property owned by him and known as Lot No. 6 in the Town of Horseheads, New York. On July 24, 1991 the attorney for the Bank wrote to the Debtor and requested that he state whether he intended to reaffirm, redeem or surrender the secured property. By letter dated July 29, 1991, the Debtor's attorney advised the Bank's attorney that the Debtor intended to reaffirm the debt. On August 6, 1991 the attor-ney for the Bank mailed a reaffirmation agreement to the Debtor's attor-ney. There was no response and on September 20, September 23, September 30, October 7, December 27, January 9 and January 13 the Bank's attorney contacted the Debtor's attorney requesting the return of the signed reaffirmation agreement. The Debtor was granted a discharge on September 26, 1991, and the case was closed on November 26, 1991.

On or about January 24, 1992 the Bank's attorney served the Debtor with a motion to dismiss the bankruptcy case on the grounds that the Debtor never reaffirmed, redeemed or surrendered the secured property in violation of Section 521. Since the case was already closed, this motion was never scheduled for a hearing before the Court. On January 24, 1992 the Debtor executed a reaffirmation agreement with

the Bank and signed a motion to reopen the bankruptcy case and approve the reaffirma-tion agreement. The Bank's attorney sent these papers to the Court with a proposed order to reopen the Debtor's bankruptcy case in order to conduct a hearing pursuant to Section 524(d) so that the reaffirmation agreement would be enforceable as meeting all of the requirements of Section 524(c).

DISCUSSION

The Debtor and the Bank are requesting that the closed Chapter 7 case be reopened and the Debtor be allowed to attend a hearing required by Section 524(c) and (d), so that his reaffirmation agreement with the Bank, executed four months after his discharge was granted and two months after his case was closed, will be enforceable. The Bank asserts that this will prevent the Bank from commencing an action to foreclose its mortgage on the Debtor's residence. The Debtor and the Bank base their request on Section 524(d), which states that, "If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c), then the Court shall hold a hearing at which the debtor shall appear in person . . ."

The Bank argues that a debtor should be able to enter into a bind-ing reaffirmation after the entry of a discharge if the Court holds a Section 524(d) hearing at which the debtor appears.

Section 524(c) of the Bankruptcy Code allows a debtor to remain personally obligated post-discharge on a debt which is otherwise dis-chargeable. In re Eccleston, 70 B.R. 210, 211 (Bankr. N.D.N.Y. 1986). Section 524(c) states,

> 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 any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if -
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> (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

> (2) such agreement contains a clear and conspicu-ous statement which advises the debtor that the agree-ment may be rescinded 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;
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> (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that such agreement -
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> (A) represents a fully informed and volun-tary agreement by the debtor; and
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> (B) does not impose an undue hardship on the debtor or a dependent of the debtor;
>
> (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;
>
> (5) the provisions of subsection (d) of this section have been complied with; and
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> (6) (A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as -
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> (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and
>
> (ii) in the best interest of the debtor.
>
> (B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

11 U.S.C. § 524(c) (emphasis added).

Therefore, under this section in order for such an agreement to be enforceable, it must be made prior to the granting of a discharge under Section 727.

When Congress amended Section 524, there was a clear emphasis on a debtor's "fresh start" and a concern for a debtor's relief from creditor pressure after bankruptcy. The amendments left unaltered the unambiguous language of Section 524(c) that reaffirmation agreements must be entered into prior to discharge to have legal significance. In re Eccleston, 70 B.R. at 212.

The Bank's reading of Section 524(d) as allowing post-discharge reaffirmation agreements is inconsistent with Section 524(c) which requires that the agreement be made before the discharge. Bankruptcy Judge Robert J. Kressel of the District of Minnesota considered this same argument in In re Saeger, 119 B.R. 184, 188 (Bankr. D.Minn. 1990). The creditor in that case had argued that the two sections, 524(c) and 524(d) be read chronologically: if after the debt is discharged and the debtor wishes to reaffirm a debt, then the Court shall hold a hearing. Id. However, Judge Kressel disagreed with this chronological reading and held that Sections 524(c) and 524(d) only state "two prerequisites to a hearing: (1) the discharge has been granted; and (2) the debtor wishes to reaffirm." Id. "In fact, by explicit terms, a reaffirmation agreement is not enforceable unless it is executed prior to the entry of a discharge." Id.

Under Section 524(c)(1) a reaffirmation agreement between a creditor and debtor must be "made before the granting of the discharge under Section 727, 1141, 1228 or 1328" (emphasis added). The Bankruptcy Code does not define the term "made," and the legislative history is not clear. This Court notes that Black's Law Dictionary lists "executed" in the definition of "made." Black's Law Dictionary 950 (6th ed. 1990). Judge Kressel found that the agreement must be executed before it can be enforceable in Saeger when he analyzed Section 524(c). 119 B.R. at 188. Since the spirit of Section 524(c) is to have a finalized agreement which has been signed by the debtor before the discharge, this Court agrees with Judge Kressel's decision that Section 524(c) requires that an agreement be executed, and therefore signed by at least the debtor, before the granting of a discharge to be enforceable.

Since most debts which are reaffirmed are secured consumer debts, the debtor and the debtor's attorney, if they have not addressed this issue pre-petition, must focus on the issue of reaffirmation very early in the case in order to comply with the requirements of Section 521(2).[1] Rule 4004(c) allows a debtor, for

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[1] Section 521(2) provides,

> if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate -
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> (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

whose benefit the protection of Sections 524(c) and (d) are designed, to defer the granting of a discharge. Therefore, in an appropriate case, if a debtor wishes to enter into a reaffirmation agreement but for some reason the agreement can not be fully executed by the parties before the granting of his discharge, there is a procedure to obtain the necessary additional time to accomplish this.

Pursuant to Section 350(b) and Rule 5010, the decision of whether to reopen a case is in the Court's discretion. In re Maddox, 62 B.R. 510, 512 (Bankr. E.D.N.Y. 1986). In this case, the reaffirmation agreement that the Debtor has entered into with the Bank is not enforceable because it was made after the discharge and thus does not comply with the requirements of Section 524(c). It would not serve any purpose to reopen the bankruptcy case, since even if the Debtor attends a hearing scheduled pursuant to 524(d) the reaffirmation agreement will not become enforceable.

The request of the Debtor and the Bank to reopen this case is denied.

IT IS SO ORDERED.

Dated: September 9, 1992

_____/s/_____
HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

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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 . . .