UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE:

CHARLES E. DURHAM, SR. and
ROSALIND L. DURHAM
Debtors.

Case No. 97-34370-WHB
Chapter 7

MEMORANDUM OPINION AND ORDER ON DEBTORS' MOTION TO SET ASIDE ORDER GRANTING MELLON MORTGAGE COMPANY'S MOTION TO TERMINATE STAY AND ALLOW FORECLOSURE

Pending before the Court is the reconsideration of Mellon Mortgage Company's ("Mellon") Motion to Terminate Stay and Allow Foreclosure. An order was entered on Mellon's motion, and the debtors timely moved to set that order aside. By consent of the parties, the issues were submitted on undisputed facts as matters of law. This is a chapter 7 case where the debtors wish to retain their home but have not entered into the typical reaffirmation agreement. 11 U.S.C. § 524(c). The significant issue concerns the validity and effect of a postpetition forbearance agreement This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Based on the analysis below, the automatic stay will be lifted. The following constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

FACTUAL SUMMARY

The following are the undisputed facts. Mellon is the mortgage holder on the debtors' residence at 3150 Chandler Street, Memphis, Tennessee. On October 2, 1997, the debtors filed a voluntary petition for chapter 7 relief. Pursuant to 11 U.S.C. § 521(2)(A), the debtors filed a "Statement of Intention" wherein they stated their intention to reaffirm their debt to Mellon pursuant

to § 524(c). On October 10, 1997, Mellon and the debtors entered into a "Forbearance Agreement" wherein the debtors agreed to make regular monthly payments under their note. In return, Mellon, which was not aware of the debtors' bankruptcy filing, would not foreclose as long as these payments were made. The debtors never reaffirmed as indicated in their Statement of Intention. Mellon filed a Motion to Terminate Stay and Authorize Foreclosure on December 15, 1997, which was granted on March 10, 1998. The debtors had received their discharge on January 13, 1998. On March 18, 1998, the debtors filed a Motion to Set Aside the aforementioned order. After a hearing on April 9, 1998, this Court granted in part the debtors' motion, that is to reconsider the stay relief, while taking under advisement the issue of the validity and effect of the postpetition forbearance agreement.

DISCUSSION

The situation at issue here is governed by 11 U.S.C. § 521(2) which states in pertinent part, as to a debtor's duties:

> The debtor shall--
> (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;
> 11 U.S.C. § 521 (emphasis added).

The Court of Appeals for the Sixth Circuit, construing analogous provisions in the pre-1984

Bankruptcy Code, held "that redemption and reaffirmation constituted the exclusive methods pursuant to which [the debtors] could retain possession of the secured collateral." General Motors Acceptance Corporation V. Bell (In re Bell), 700 F.2d 1053, 1058 (6th Cir. 1983). Furthermore, the *sole* method of redemption is a *lump-sum* redemption, not an *installment* redemption. Id. The holding of *Bell*, of course, currently addresses attempted retention of personal property, as § 722's redemption only applies to "tangible personal property." A mutually voluntary reaffirmation is the only statutory method for retention of real property and payment of mortgage debt. The Bankruptcy Code, of course, permits a debtor's voluntary repayment of discharged debt but does not compel the creditor to accept such payment. 11 U.S.C. § 524(f). The holding in *Bell* is still the prevailing law in the Sixth Circuit. See, Schmidt v. Old Kent Bank and Trust Co. (In re Schmidt), 145 B.R. 543 (Bankr. W.D. Mich. 1992). Some other Circuits have followed *Bell.* See, for example, Taylor v. AGE Federal Credit Union, 3 F.3d 1512, 1516 (11th 1993). The fact that there is a split in the Circuits on this issue, with some allowing installment redemption of personal property is of no influence in this case, as we are concerned with real property and controlled by Sixth Circuit precedent. See, for example, McClellan Federal Credit Union v. Parker (In re Parker), 1998 WL 113872 (9th Cir.) (collecting cases on both sides of split).

There is nothing in the plain language of § 521 which allows the debtor to simply retain the real property collateral while continuing to make payments. Section 521(2)(B) is mandatory, requiring the debtor to act upon his stated intent. The debtors in the instant case did not; rather, they entered into a postpetition forbearance agreement, without telling Mellon that they had filed for bankruptcy relief. The forbearance agreement, entered into by Mellon with no knowledge of the bankruptcy filing, does not function as a mutually voluntary reaffirmation agreement, as it does

not comply with the requirements of § 524(c), and it is therefore ineffective also for purposes of § 521(2)(A) and (B).

CONCLUSION AND ORDER

Based on the analysis above, upon reconsideration, Mellon's Motion to Terminate Stay and Allow Foreclosure will be granted without prejudice, however, to the debtors reaffirming their debt to Mellon, if the parties so agree. The Code requires a reaffirmation agreement to be executed before the granting of a discharge; however, under the circumstances of this case, these parties may be able to consent to the bankruptcy court's acceptance of a reaffirmation agreement for filing if that agreement otherwise satisfied § 524(c). The Court cannot, however, compel either side to enter into a reaffirmation agreement.

It is therefore **ORDERED** that Mellon Mortgage Company's Motion to Terminate Stay and Allow Foreclosure will be granted without prejudice to the debtors Charles E. Durham and Rosalind L. Durham reaffirming their debt to Mellon, if the parties are able to so agree. If a reaffirmation agreement is not filed within thirty (30) days from entry of this Order, the Clerk shall proceed to complete administration and closing of this case.

IT IS SO ORDERED, this April 21, 1998.

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William Houston Brown
UNITED STATES BANKRUPTCY JUDGE

cc:
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