FILED

UNITED STATES BANKRUPTCY COURT

95 DEC 29 PM 3:38

FOR THE DISTRICT OF SOUTH CAROLINA

U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

ENTERED
DEC 29 1995
CLERK

IN RE:

Dorothy Ann Davis,

Debtor.

C/A No. 84-00578

Adv. Pro. No. 95-8176

Dorothy Ann Davis,

Plaintiff,

v.

NationsBank,

Defendant.

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, judgment shall be entered in favor of the Plaintiff in the amount of $12,670.03, plus interest at the rate of 8.75% from August 26, 1992 to date of judgment, plus $3,000.00 as attorneys fees and costs.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
December 29, 1995.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Dorothy Ann Davis,

Debtor.

C/A No. 84-00578

Adv. Pro. No. 95-8176

Dorothy Ann Davis,

Plaintiff,

v.

NationsBank,

Defendant.

ORDER

Chapter 7

THIS MATTER comes before the Court upon a Complaint styled as seeking turnover of property pursuant to 11 U.S.C. §542[1] but which actually seeks a determination of civil contempt and recovery of damages attributable to a violation of the discharge injunction of §524(a) upon the grounds that the Defendant improperly required the Plaintiff to repay a debt which had been discharged in her previous Chapter 7 bankruptcy. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§157, 1334 and 11 U.S.C. §524. This is a core proceeding under 28 U.S.C. §157(b)(2)(O).

After receiving the testimony, considering the evidence and weighing the credibility of the witnesses, the Court makes the following Findings of Fact and Conclusions of Law pursuant

[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et. seq.*, shall be by section number only.

to Fed.R.Civ.P. 52, made applicable by Bankruptcy Rule 7052.[2]

FINDINGS OF FACT

1. Dorothy Ann Davis, the Plaintiff ("Dr. Davis"), filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code on April 13, 1984.

2. Dr. Davis received her discharge by this Court pursuant to an Order dated August 21, 1984, and the case was closed by Order entered January 30, 1985.

3. One of the general unsecured non-priority creditors scheduled in Dr. Davis' bankruptcy petition was Bankers Trust of SC, n/k/a NationsBank ("NationsBank" or the "Bank"), with a debt of $12,386.15. There is no dispute that the Bank received notice of the bankruptcy case and discharge order. This debt was discharged in the bankruptcy.

4. Since about 1989, Dr. Davis had established a good business relationship with C&S Bank also n/k/a NationsBank ("C&S Bank"), and the particular loan officer with whom she dealt, Mr. Don Terrell ("Mr. Terrell"). In addition to her automobile loans, she had a first mortgage on her home and farm ("home property") through C&S Bank and a home equity line of credit through C&S Bank which she used for construction of a carriage house.

5. After the work on her carriage house had commenced, Dr. Davis learned that the total construction costs would be approximately $35,000 more than anticipated.

---

[2] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

6. During the summer of 1992, Dr. Davis approached Mr. Terrell about refinancing her existing loans on her home property and acquiring additional funds to complete the construction of the carriage house.

7. Mr. Terrell referred Dr. Davis to one of his subordinates, Mr. Roy Fakoury ("Mr. Fakoury"), a consumer lender with C&S Bank regarding the refinancing loan.

8. In the summer of 1992, Mr. Fakoury on behalf of C&S Bank approved the refinancing of Dr. Davis' home property. The amount of the loan was dependent upon the loan to value ratio of the appraisal.

9. Dr. Davis was not satisfied with the first appraisal performed on her home property and asked that another one be performed. Although it was customary for the Bank to use the lower of multiple appraisals, it agreed to conduct another appraisal because of the Bank's relationship with Dr. Davis. Additionally, even though the second appraisal was lower than the first, the Bank agreed to use the value from the first appraisal.

10. During the interim period between the loan approval and the closing, C&S Bank merged with NationsBank and switched to NationsBank's computer system.

11. Although the loan had been approved under the C&S Bank system, since the system switched before closing, Mr. Fakoury was required to run the loan through the NationsBank computer system. When he did, he noted a red flag, indicating a charge off.

12. Mr. Fakoury's investigation of the charge off led him to contact AMRESCO, which at that time handled problem debts for the Bank. Mr. Fakoury understood from AMRESCO that the red flag was placed on the file due to the discharged debt from Dr. Davis to Bankers Trust.

13. Mr. Fakoury testified that he knew that he could not on behalf of the Bank make repayment of the discharged debt a condition of the new loan but that he did however inform Dr. Davis of the red flag which had shown on her credit report prior to closing and advised her that if she wanted to repay the debt she could.

14. Dr. Davis testified that Mr. Fakoury first informed her of the red flag notice on her record just two days before the closing of the refinancing loan and that he characterized it as a problem.

15. Dr. Davis was anxious to close the new refinancing loan and testified that because she felt it had been unreasonably delayed she contacted Mr. Terrell who assisted in the closing being scheduled within 5 days.

16. Pursuant to the Bank's instructions, when the loan was closed on or about August 26, 1992, the sum of $12,670.03[3] was deducted from the proceeds due Dr. Davis and was paid to NationsBank to satisfy the previously discharged debt.

17. The Bank did not ask Dr. Davis to sign any written acknowledgment that the debt was being repaid voluntarily, sign a waiver of her rights, or consider a reaffirmation agreement.

CONCLUSIONS OF LAW

The discharge of a debt under the United States Bankruptcy Code operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor. 11

[3]The difference in the amount scheduled, $12,386.15, and the amount paid back, $12,670.03, is unclear, but it is undisputed that it is the same debt.

U.S.C. §524(a)(2). It is undisputed that the subject debt was previously discharged in the Chapter 7 bankruptcy, that the Bank knew of the discharge at that time, and that it clearly would be a violation of §524(a)(2) for the Bank to require Dr. Davis to repay the debt as a condition of receiving the new refinancing loan, or for any other reason. The only way the debt could be legitimately satisfied would be through a voluntary repayment by Dr. Davis.

A debtor is free to voluntarily repay a discharged debt. 11 U.S.C. §524(f). "Section 524(f) thus allows a debtor to repay a debt after bankruptcy even though a reaffirmation agreement is not obtained." In re Hudson, 31 C.B.C. 478, 481 (S.D.Ill. 1994). Courts construing §524(f), however, have emphasized that this provision invalidates repayment that is induced in any manner by the act of a creditor. See, Van Meter v. American State Bank, 89 B.R. 32, 34 (W.D.Ark. 1988); In re Bowling, 116 B.R. 659, 664 (Bkrtcy.S.D.Ind. 1990); In re Lillie, 12 B.R. 860, 862 (Bankr.N.D.Ohio 1981) (repayment of debt through wage deduction was not voluntary due to implied pressure from employer-employee relationship).

> While repayment due to harassment or duress by a creditor is clearly prohibited, it is unclear the extent to which a debtor's repayment must be free from other external influences. One meaning of "voluntary" would require that the repayment be spontaneous, that is, induced by nothing other than the debtor's own conscience. See, Van Meter, 89 B.R. at 34. On the other hand, "voluntary" is often used to refer to actions resulting from one's interest in experiencing gain or avoiding loss. Under this interpretation, voluntariness would be determined from the totality of circumstances surrounding the repayment.

In re Hudson, 31 C.B.C. at 481.

In the instant case, Dr. Davis maintains not only that she did not voluntarily repay the discharged debt but she repaid the debt under duress. NationsBank takes the position that Dr.

Davis was not under duress from the Bank when she agreed to repay the discharged debt and therefore it must have been a voluntary repayment. However, according to the In re Hudson and the Van Meter v. American State Bank opinions as well as the literal reading of §524, the element of duress itself is not essential to the determination before the Court and need not be proven. All that is required to void the repayment of a discharged debt is an act on the part of the creditor that induces a debtor to repay a discharged debt that the debtor would not otherwise voluntarily repay. In Hudson, the court found that an objective test of voluntariness should be applied and found that the repayments in that case were made on the debtor's initiative and without any influence or inducement from the bank. In a case with facts more similar to the ones presently before this Court, the Bankruptcy Court for the Western District of Arkansas in defining the term "voluntary" , stated:

> What Congress seemingly wished to do when it enacted §524(c) and § 524(d) was to forestall all inquiries about the voluntariness of discharge agreements with creditors by narrowly and rigidly defining what kinds of agreements were valid. The means that it chose, in this court's view, was to make void all post-discharge agreements....The court therefore holds that the provisions of §524(f) do not validate repayments of discharged debts that are in any manner induced by the acts of the creditor.

Van Meter v. American State Bank, 89 B.R. 32, 34 (W.D.Ark. 1988). Under the Van Meter test, the Court must look to the totality of the circumstances to determine voluntariness and whether the repayment of the debt was induced in any manner by the acts of the creditor.

Likewise, in In re Bowling, 116 B.R. 659 (Bkrtcy.S.D.Ind. 1990), the court found that the debtors' repayment of a discharged debt was not a permissible voluntary repayment of a discharged debt. Rather, it was an agreement to reaffirm the debt which did not comply with the

reaffirmation requirements of the Bankruptcy Code and was thus legally unenforceable, even if the creditor did not coerce or pressure the debtors into reaffirming the debt. The court found that the bank told the debtors that to get a loan for new money, and to re-establish good credit, they would have to repay the discharged debt. Id. at 661. The court treated the repayment as a reaffirmation rather than a voluntary payment under §524(f): "No transaction that leaves a debtor obligated to pay, or believing that he or she is obligated to pay any part of a discharged debt can be characterized as voluntary repayment within the meaning of section 524(f)." Id. at 664. Since the debtors' reaffirmation of their discharged debt did not comply with § 524(c) and (d), the subsequent note was found to be legally unenforceable. "The fact that Fidelity did not coerce or pressure the debtors into reaffirming the debt makes no difference; no reaffirmation is enforceable unless it is made in compliance with sections 524(c) and (d). See In re Gardner, 57 B.R. 609, 611 (Bkrtcy.D.Maine 1986.)" In re Bowling, 116 B.R. at 664.

The issue for this Court therefore is whether the debt was repaid voluntarily by Dr. Davis and whether the Bank took any inappropriate action to induce or influence the Debtor to repayment. This Court agrees that such a determination must be based not only on the statements of intention and beliefs by the parties, but on the totality of circumstances existing at the time of repayment.

In this instance, Mr. Fakoury and another bank officer, Mr. Michael Pullum ("Mr. Pullum"), testified that Dr. Davis indicated her agreement to voluntarily pay the debt in a telephone conversation with Mr. Fakoury which was overheard by Mr. Pullum. Dr. Davis adamantly disputes this testimony and asserts that the repayment was made only because Mr. Fakoury had indicated that the red flag was a problem to her refinancing loan on her home

property. When faced with such direct contradictory testimony, the Court must closely examine the sequence of events and circumstances surrounding Dr. Davis' repayment of the debt.

As developed at trial, Dr. Davis was in the process of remodeling a carriage house on her farm when she ran out of funds to complete the project. She was being pressured to make payment to the contractor who was owed over $10,000.00 for completed work. Dr. Davis' method for paying these bills was to refinance into one loan transaction the first mortgage on her home property with the home equity line of credit used to that point to finance the construction of the carriage house and also to net her enough extra proceeds from the equity in the property to apply towards further construction costs. Dr. Davis presented this proposal to Mr. Terrell who indicated such a loan would likely be approved and then referred her to Mr. Fakoury, his subordinate, for the processing of the loan request. After the loan was approved but before the closing, Mr. Fakoury questioned Dr. Davis about the discharged debt. According to Dr. Davis, due to the constant requests for payment from the contractor and the realization that she would not be able to get a similar loan at another lending institution, she agreed on the eve of closing to deduct the balance due on the discharged debt from the new loan proceeds.

The Court finds credible the testimony of Dr. Davis that the only method of payment of these bills was the closing of the NationsBank loan. While the Court does not find, nor must it find for these purposes, that the Bank forced Dr. Davis to repay the discharged debt under duress or even that the Bank formally required repayment as a prerequisite before it would close the loan, the Court finds that Dr. Davis did not voluntarily repay the discharged debt but that the repayment was induced by acts of the Bank.

In determining the correct definition of voluntary in conjunction with §524, the Court

looks to the Southern District of Illinois' In re Hudson decision which held:

> The Court finds that "voluntary" in §524(f) is used in an objective sense as referring to repayment that is free from creditor influence or inducement, regardless of whether the debtor was motivated by forces unrelated to the creditor. Under this reading of §524(f), the Court need not satisfy itself that the debtor's action was wholly spontaneous nor need it monitor the debtor's psyche to ascertain what forces motivated the debtor's repayment. Rather, the Court will examine the appropriateness of the creditor's actions to determine if any violation of the preceding subsections protecting the debtor's discharge occurred.

In re Hudson, 31 C.B.C. at 482. In this case, the Court finds that Dr. Davis agreed to repayment of the discharged debt solely because of the Bank's notification to Dr. Davis about the existence of the discharged debt after the approval of the loan but before the closing which led her to believe that the closing may not occur or may be further delayed without the repayment. Considering the sequence of events and circumstances surrounding the refinancing loan, this Court concludes that the actions of the Bank inappropriately resulted in repayment and therefore violated the provisions of §524.

Of particular importance to this Court is the fact that the bank officers testified that they did not ask for Dr. Davis to sign any document to evidence a voluntary repayment of the debt. If such a document had been prepared in conformity with the requirements of §524, this issue would in all likelihood not have come before the Court. See In re Roush, 8d B.R. 163 (Bkrtcy. S.D. Ohio 1988), and In re Conti, 50 B.R. 142 (Bkrtcy. E.D. Va. 1985).

While the Court questions the delay of Dr. Davis in raising this issue and bringing this adversary proceeding, her explanation that her accountant questioned the repayment of the debt during a review of her tax returns three years after the closing of the loan is plausible and

uncontradicted.

For all of the foregoing reasons, this Court finds the Bank in civil contempt for violation of the discharge injunction and therefore orders that judgment shall be entered in favor of Plaintiff against the Defendant in the amount of $12,670.03, plus interest at the rate of 8.75% from August 26, 1992 to date of this judgment. At the hearing, there was no evidence presented as to the amount of attorney's fees and costs incurred by the Plaintiff in this action. However, based on a review of the pleadings and the conduct of the hearings on the motion to reopen and summary judgment motion, as well as the trial, the Court sets $3,000.00 as reasonable attorneys fees and costs awardable as actual damages pursuant to §524. Additionally, it is the finding of the Court that the actions of the Bank do not warrant an award of punitive damages. For the reasons stated within, it is therefore,

ORDERED, that judgment shall be entered in favor of the Plaintiff in the amount of $12,670.03, plus interest at the rate of 8.75% from August 26, 1992 to date of judgment, plus $3,000.00 as attorneys fees and costs.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
December 29, 1995.