

JUN 4 - 2007

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)	
)	Chapter 7
ANTOINETTE L. MOUSTAFI,)	
)	Case No. 4-07-00407-EWH
)	
Debtor.)	MEMORANDUM DECISION

I. INTRODUCTION

The Debtor complied with the requirements of the Bankruptcy Code by timely filing her statement of intention and timely entering into a reaffirmation agreement with the credit union that holds a security interest in her car. That reaffirmation agreement will not, however, be approved because the Debtor's net monthly income is less than her expenses and because the car is worth less than what she owes on it. Despite the changes made to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), a debtor may still, under certain limited circumstances, retain a car even without a court approved reaffirmation agreement. This is such a case.

II. FACTUAL AND PROCEDURAL HISTORY

Antoinette Moustafi ("Debtor"), a single parent of two children, filed a pro se Chapter 7 petition on March 16, 2007. On March 20, 2007, she filed her individual

1 statement of intention ("Statement") using Official Form 8. On the Statement, she
2 checked the reaffirmation column for a 2005 Nissan Frontier ("Nissan"), indicating that
3 she intended to reaffirm the debt. The Statement lists Vantage West Credit Union
4 ("Vantage") as holding a security interest in the Nissan. Schedule D lists the amount of
5 Vantage's claim as \$27,011 and, of that amount, \$11,911 is reported as unsecured.
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7 On April 19, 2007, the Debtor executed a reaffirmation agreement for the Nissan
8 ("Reaffirmation Agreement"), which was accepted by Vantage's representative on
9 April 20, 2007. On that same day, the Reaffirmation Agreement was filed with the
10 court. The Debtor's first meeting of creditors was held on May 8, 2007.
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12 Under the Reaffirmation Agreement, the Debtor agreed to reaffirm her debt to
13 Vantage under the original terms of the attached "Motor Vehicle Retail Installment
14 Sales Contract and Purchase Money Security Agreement" (Vantage Security
15 Agreement), dated June 10, 2006. The Reaffirmation Agreement indicates that the
16 outstanding loan balance is \$26,304; the amount of the monthly payment is \$519; and
17 the interest rate is 8.25%. Also attached to the Reaffirmation Agreement is a Kelly Blue
18 Book valuation which sets the "total wholesale/retail value" of the Nissan as between
19 \$19,475 and \$23,480.
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21 The Debtor's Statement in support of the Reaffirmation Agreement (Part D) was
22 filled in, indicating that she has a monthly income of \$2,000 and no expenses, "leaving
23 \$520" to make the car payment. However, Debtor's Schedules I and J indicate that her
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1 monthly net income, after deducting the \$520 car payment and other monthly
2 expenses, is a negative \$179.¹

3 On May 15, 2007, the court held a hearing on approval of the Reaffirmation
4 Agreement. The Debtor appeared and participated in the court's "friend of the court"
5 reaffirmation program in which attorneys volunteer to review reaffirmation agreements
6 with pro se debtors. The volunteer attorneys make recommendations to the court on
7 whether approval of a proposed reaffirmation agreement is in a debtor's best interest.
8 At the hearing, the friend of the court stated that he did not think the Reaffirmation
9 Agreement was in the Debtor's best interest, but that the Debtor wanted to go forward
10 with it, apparently believing if the Reaffirmation Agreement was not approved, Vantage
11 would repossess the Nissan.
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13 Counsel for Vantage was present at the hearing. He reported that Vantage had
14 valued the car at about \$21,000, and that Vantage was unwilling to modify the terms of
15 the original contract. Counsel's statements supported the notion that Vantage would
16 repossess the car if the Reaffirmation Agreement was not approved, noting that the
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23 ¹ According to Interim Rule 4008, the amounts listed by a debtor in Part D of a reaffirmation
24 agreement should be the same as what is shown on Schedules I and J. If there is a difference,
25 there should be an accompanying statement explaining the difference. There was no
26 accompanying statement explaining why the expenses in Part D of the Reaffirmation
27 Agreement were different than on Schedule J. Moreover, it is apparent that the Debtor
28 misunderstood Part D because no one has zero expenses. Accordingly, the court relied on the
Debtor's Schedules I and J for income and expenses in determining whether approval of the
Reaffirmation Agreement was in the Debtor's best interest.

1 Debtor would likely have to pay a much higher interest rate to obtain another car.² At
2 the conclusion of the hearing, the matter was taken under advisement. It is now ready
3 for decision.
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6 **III. ISSUES TO BE DECIDED**

- 7 1. Is approval of the Reaffirmation Agreement in the Debtor's best interest?
8 2. If the Reaffirmation Agreement is not approved, may Vantage repossess
9 the Nissan before or after the Debtor's discharge?
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12 **IV. JURISDICTIONAL STATEMENT**

13 Jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(b)(2).
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16 **V. DISCUSSION**

17 Prior to enactment of BAPCPA, Chapter 7 debtors in the Ninth Circuit, who were
18 current on their payment and insurance obligations, could retain their cars without
19 entering into reaffirmation agreements. The so-called "ride-through" or "retain and pay"
20 option was approved by the Ninth Circuit in McClellan Fed. Credit Union v. Parker (In re
21 Parker), 139 F.3d 668, 673 (9th Cir. 1998). Parker held that redemption or reaffirmation
22 were not the only alternatives available to a debtor under 11 U.S.C. § 521(2)(A).³
23

24 _____
25 ² Vantage's Security Agreement makes the commencement of any bankruptcy an event of
26 default (¶ 8) and authorizes Vantage, in the event of a default, to repossess its collateral (¶ 10).

27 ³ BAPCPA redesignated § 521(2) as § 521(a)(2), so that § 521(2)(A) is now § 521(a)(2)(A).
28 BAPCPA did not change the language of subparagraph (A), which provides:

1 [T]he only mandatory act is the filing of the statement of intention, which
2 the debtor “shall” file. Then, “if applicable,” – that is, if the debtor plans to
3 choose any of the three options listed later in the statute (claiming the
4 property as exempt, redeeming the property, or reaffirming the debt) – the
5 debtor must so specify in the statement of intention. The debtor’s other
6 options remain available, as unambiguously stated in § 521(2)(C):
7 “[N]othing in subparagraph [] (A) . . . shall alter the debtor’s or the
8 trustee’s rights with regard to such property under this title.”⁴

9 Id. at 673. The ride-through option “allowed a debtor to keep the collateral as long as
10 he or she maintained timely payments to the secured creditor, and also provided a
11 debtor with the benefit of the discharge as to any unsecured liability.” In re Steinhaus,
12 349 B.R. 694, 700 (Bankr. D. Idaho 2006).

13 A. BAPCPA’s Changes to Section 521

14 While BAPCPA did not alter the language of subparagraph (A) of § 521(2) (now
15 § 521(a)(2)), other changes were made to § 521. Section 521(a)(2) now applies to all
16 secured debts, not just secured consumer debts. See In re Root, 2006 WL 1050687, at
17 *3 (Bankr. N.D. Iowa April 11, 2006) (BAPCPA amended § 521(a)(2) by deleting the
18 term “consumer” as a modifier of “debts”). Section 521(a)(2)(B) changes the time by
19 which a debtor “shall perform” the intention elected in the statement of intention from
20 45 days from the filing of the statement to “within 30 days after the first date set for the
21 meeting of creditors.”

22 within thirty days after the date of the filing of a petition under chapter 7 of this
23 title or on or before the date of the meeting of creditors, whichever is earlier, or
24 within such additional time as the court, for cause, within such period fixes, the
25 debtor shall file with the clerk a statement of his intention with respect to the
26 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;

27 ⁴ BAPCPA redesignated § 521(2)(C) as § 521(a)(2)(C) and added the following language to
the end of the subsection: “except as provided in Section 362(h).”

1 BAPCPA added language to subparagraph (C) (now § 521(a)(2)(C)), which
2 makes a debtor's (and a trustee's) rights in personal property subject to § 362(h).
3 Section 362(h)(1) terminates the automatic stay and removes personal property from
4 the estate if a debtor fails to: (1) file a statement of intention by the earlier of 30 days
5 from the petition date or the date of the first meeting of creditors⁵ and/or (2) fails to take
6 the actions specified in the statement of intention within 30 days of the first date set for
7 the meeting of creditors.⁶ The deadline for a debtor to perform the statement of
8 intention does not apply if: (1) the statement "specifies" the debtor's intention to
9 reaffirm the debt "on the original contract terms"; and (2) the creditor refuses to reaffirm
10 the debt on its original terms.⁷
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13 BAPCPA also added a subparagraph to § 521. Under new subparagraph (d), a
14 debtor's failure to timely perform the actions required by § 362(h)(1) and (2) permits a
15 creditor who holds a prepetition security interest in personal property to enforce any
16 provision in its security agreement which makes the filing of a bankruptcy case an event
17 of default ("ipso facto" clause).
18

19 Section 521(d) also makes ipso facto clauses enforceable if a debtor fails to
20 comply with § 521(a)(6) of the Code. Section 521(a)(6) applies to personal property "as
21 to which a creditor has an allowed claim for the purchase price secured in whole or in
22 part by" personal property. Where § 521(a)(6) applies, it requires the debtor to either
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24 ⁵ Section 362(h)(1)(A).

25 ⁶ Section 362(h)(1)(B).

26 ⁷ *Id.* The "reaffirmation column" on Official Form 8 does not provide the option for a debtor to
27 "specify" the intention to reaffirm the debt on the original contract terms. Form 8's reaffirmation
28 choice merely provides that the "debt will be reaffirmed pursuant to 11 U.S.C. § 524(c)."

1 enter into a reaffirmation agreement or redeem the personal property pursuant to
2 § 722.⁸ The consequences for a debtor who does not reaffirm or redeem are similar to
3 those set out in § 362(h) -- the stay lifts, the property ceases to be property of the
4 estate, and the creditor is permitted to take whatever action is permitted under non-
5 bankruptcy law.
6

7 In this case, because Vantage has not filed a proof of claim, it does not have an
8 "allowed" claim. Therefore, § 521(a)(6) does not apply. See In re Donald, 343 B.R.
9 524, 535 (Bankr. E.D. N.C. 2006). Furthermore, it is unclear if a creditor will ever have
10 an allowed claim for the purchase price -- even if a proof of claim is filed -- because a
11 creditor's claim on the petition date will rarely equal the purchase price of the collateral.
12 Id. at 536-37 (a claim for the purchase price indicates a claim for the full purchase
13 price); see also In re Hinson, 352 B.R. 48, 51-52 (Bankr. E.D. N.C. 2006).
14

15 B. The Role of the Court in the Reaffirmation Process

16 Section 524(c)(6) requires court review of reaffirmation agreements for debts
17 secured by personal property where debtors are not represented by attorneys in the
18 negotiation of the reaffirmation agreement. Such agreements are only effective if
19 approved by the court as not imposing an undue hardship on the unrepresented debtor
20 or her dependents and as being in the debtor's best interest.⁹
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22 In this case, the Reaffirmation Agreement is not in the best interest of the Debtor
23 because her expenses, including her car payment, exceed her income and because the
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26 ⁸ §§ 521(a)(6)(A), (B).

27 ⁹ §§ 524(c)(6)(A)(i) and (ii).
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1 debt is greater than the value of the Nissan. Accordingly, the Reaffirmation Agreement
2 will not be approved.

3 C. The Impact of Disapproval fo the Reaffirmation Agreement
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5 If disapproval of the Reaffirmation Agreement means that the Debtor has failed to
6 perform her intention as required by § 521(a)(2)(B), then § 521(d) would apply,
7 permitting Vantage to enforce its ipso facto clause. Post-discharge, Vantage would be
8 able to repossess the Nissan because the Debtor's bankruptcy filing is an event of
9 default under the Vantage Security Agreement.

10 In In re Husain, 2007 WL 709302 (Bankr. E.D. Va. March 5, 2007), the court
11 addressed this issue and found:

12
13 The Debtors' timely act of entering into mutually satisfactory reaffirmation
14 Agreements with their creditors must be viewed as sufficient to satisfy the
15 performance standards of § 521(a). Those performance requirements
16 should not be read as a mandate for debtors to entirely consummate their
17 stated intentions. . . . Section 521(a) of the Bankruptcy Code merely
18 requires the debtor to "take steps to act on an intention to either retain or
19 surrender." . . . The Debtors in the case at bar did everything in their
20 capacity to perform.

21 2007 WL 709302, at *5 (citations omitted in text). This court agrees. The
22 consequences of § 362(h)(1) and § 521(d) -- lifting the automatic stay and making ipso
23 facto default clauses enforceable -- are only caused by a debtor's failure to timely file a
24 statement of intention and/or to timely enter into a reaffirmation agreement, "not by the
25 court's disapproval of the agreement or by its determination that the agreement is
26 unenforceable." Id.; see also In re Blakeley, 2007 WL 674712, at *6 (Bankr. D. Utah
27 Jan. 17, 2007) ("It is not necessary for the Court to approve the reaffirmation agreement
28 in order for the Debtor to comply with § 521 or § 362(h).").

1 In this case, the Debtor filed her Statement of Intention within 30 days of the
2 petition date -- checking the box indicating she wished to reaffirm the Vantage debt. By
3 filing the Statement within 30 days of her petition date, the Debtor complied with the
4 requirements of §§ 521(a)(2)(A) and 362(h)(1)(A). The Debtor's first meeting of
5 creditors was held on May 8, 2007. By executing and filing the Reaffirmation Agreement
6 with the court prior to that meeting, the Debtor complied with the requirements of
7 §§ 521(a)(2)(B) and 362(h)(1)(B). Accordingly, the Nissan remains property of the
8 estate and the automatic stay remains in effect until the Debtor receives her discharge.
9 See 11 U.S.C. § 362(c)(2)(C).

11
12 Once the discharge is granted, because the Debtor has complied with
13 § 521(a)(2), Vantage may not repossess the Nissan as long as the Debtor is current on
14 her payments and insurance obligations.¹⁰ See Parker, 139 F.3d at 673; see also
15 Blakeley, 2007 WL 674712, at *6 (BAPCPA has not entirely eliminated the possibility of
16 ride-through; "where a debtor timely complies with all requirements under §§ 521 and
17 362(h), the debtor can 'ride through' the bankruptcy notwithstanding a bankruptcy court's
18 refusal to approve the reaffirmation agreement.").

19
20 The holding in this case disagrees with a number of courts which have found that
21 BAPCPA completely eliminated ride-through. See, e.g., In re Ertha Rice, 2007 WL
22 781893, at *6 (Bankr. E.D. Pa. March 12, 2007) (post-BAPCPA § 362(h) eliminates ride-
23 through); In re Rowe, 342 B.R. 341, 351 (Bankr. D. Kan. 2006) (by amending §§ 521
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26 ¹⁰ The result would be the same if § 521(a)(6) applied to the Debtor. Section 521(a)(6)(A)
27 requires that a debtor enter into a reaffirmation agreement -- not that the reaffirmation
28 agreement be approved by the court.

1 and 362, the “fourth option” was eliminated). However, BAPCPA’s amendments did not
2 eliminate ride-through in every instance; the amendments only eliminated ride-through
3 for debtors who do not comply with §§ 521(a)(2) or (a)(6). If Congress had intended to
4 completely eliminate ride-through, it could have done so by making §§ 362(h)(1) and
5 521(a)(6) apply if a reaffirmation agreement is disapproved by the court. See Blakeley,
6 2007 WL 674712, at *6 (“Had Congress intended for a debtor to obtain court approval of
7 a reaffirmation agreement as a requirement under § 521(a)(6), it could have easily done
8 so by simply omitting the words ‘enters into an’ . . . and substituting the words ‘obtains
9 court approval of an’.”).

11 The language of § 521(a)(2)(A) is identical to the language of prior § 521(2)(A),
12 which the Parker court found to be unambiguous. 139 F.3d at 673. Parker also found
13 the following language of § 521(2)(C) (now §521(a)(2)(C)) to be unambiguous:

14 “[N]othing in subparagraph [] (A) . . . shall alter the debtor’s or the trustee’s rights with
15 regard to such property under this title.”

16 BAPCPA added the following to the end of subparagraph (C): “except as
17 provided under 362(h).” However, as explained earlier in this decision, § 362(h) does
18 not apply to debtors, like Ms. Moustafi, who have timely complied with the requirements
19 of §§ 521(a)(2)(A) and (B). Consequently, when § 362(h) does not apply, § 521(a)(2)(C)
20 has the same effect as it did under Parker: “The debtor’s other options remain available,
21 as unambiguously stated in § 521[a](2)(C). . . .” 139 F.3d at 673. There is no reason for
22 this court to reach beyond the plain language of the statute to implement some
23 presumed Congressional intent to completely eliminate ride-through when the
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1 unambiguous language of §§ 521(a)(2) and (a)(6) limit BAPCPA's anti-
2 ride-through provision to debtors who fall within the purview of §§ 362(h) and 521(d).
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5 **VI. CONCLUSION**

6 The Reaffirmation Agreement is not in the Debtor's best interest and, therefore,
7 will not be approved. Because the Debtor does not fall within the provisions of § 362(h)
8 or § 521(d), she may retain the Nissan as long as she is current on her payments and
9 insurance obligations. A separate order will be entered this date specifying the rights of
10 the Debtor and the creditor with respect to the Nissan.
11

12 Dated this 4th day of June, 2007.

13
14 

15 Eileen W. Hollowell
16 U.S. Bankruptcy Judge

17 Copy of the foregoing mailed
18 this 4th day of June, 2007, to:

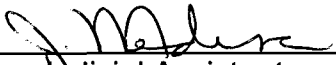
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