



ORDERED in the Southern District of Florida on November 19, 2014.

A handwritten signature in black ink, appearing to read "Laurel M. Isicoff".

**Laurel M. Isicoff, Judge
United States Bankruptcy Court**

**Tagged Opinion
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

IN RE: CASE NO. 08-23117-BKC-LMI

CARLOS DANIEL RIVAS and ILEANA Chapter 7
MARANON,

Debtors.

**ORDER DENYING CO-DEBTORS MOTION TO RESCIND
REAFFIRMATION AGREEMENT WITH JP MORGAN CHASE BANK, N.A.,**

This matter came before the Court on the Co-Debtor's Motion to Reopen Chapter 7 Case to Determine Value of Secured Claim and to Strip Off Unsecured Lien Pursuant to §506(a) and (d) and to Rescind Reaffirmation Agreement with JP Morgan Chase Bank, N.A. (ECF #65) ("Motion to Rescind"). More than six years after filing this chapter 7 case and more than four years after receiving a discharge, the Debtors moved to reopen their bankruptcy case and filed

the Motion to Rescind. The Debtors' purpose, as described in the Motion to Rescind, is to disaffirm or rescind a reaffirmation agreement between the Debtors and J.P. Morgan Chase Bank, N.A. for the purpose of stripping off the second mortgage of J.P. Morgan Chase Bank, N.A. that encumbers their home. Notwithstanding that Chase neither objected to nor even appeared to contest the relief requested, because the relief requested is neither authorized under the Bankruptcy Code nor timely brought, the Motion is DENIED.

Joint Debtors Carlos Daniel Rivas and Ileana Maranon voluntarily filed for Chapter 7 on September 10, 2008, and were represented by counsel. The Debtors filed a reaffirmation agreement (the "Reaffirmation Agreement") with JP Morgan Chase Bank, N.A. ("Chase") on October 14, 2008, reaffirming the obligations secured by a second mortgage on the Joint Debtors' homestead (the "Chase Mortgage"). Both Debtors signed the Reaffirmation Agreement. The Reaffirmation Agreement reflected that the Debtors' income exceeded their expenses by an amount adequate to pay the reaffirmed obligation. Because the Reaffirmation Agreement did not indicate a presumption of undue hardship and because the Debtors were represented by an attorney, no court hearing was necessary nor was any order required to approve the Reaffirmation Agreement.

The Debtors received their discharge on May 14, 2010 and the bankruptcy case was closed on May 16, 2011. On January 3, 2014 the Joint Debtors filed this Motion to Rescind the Reaffirmation Agreement so that they may "strip off" Chase's second lien.¹ I granted the Motion to Reopen so that the Debtors could brief the reaffirmation issue.

¹ In the Eleventh Circuit (as well as some other circuits) a lien that encumbers property, the value of which is less than the lien or liens having priority, may be "stripped off"—that is, where there is no equity in the property to support the lien, the debt the lien purports to secure, is held to be unsecured. After the United States Supreme Court decided *Dewsnup v. Timm*, 502 U.S. 410 (1992), most courts held that a debtor cannot strip off a lien in a chapter 7 case. However, in *In re McNeal*, 735 F. 3d 1263 (11th Cir. 2012), the Eleventh Circuit held, first in an unpublished opinion, that was then published, that debtors have always been able to strip off a wholly unsecured lien in a chapter

Debtors' counsel asserts that Part D of the Debtors' Reaffirmation Agreement with Chase incorrectly calculated the Debtors' monthly expenses such that the corrected adjusted monthly surplus was not enough to cover the \$620.35 monthly mortgage payment to Chase, and therefore a presumption of undue hardship should have been indicated on the Reaffirmation Agreement. Consequently, the Debtors argue, the agreement is rescindable, or alternatively, I should now set a hearing on the Reaffirmation Agreement to determine whether reaffirmation was appropriate.

The Debtors' request to rescind is untimely. 11 U.S.C. §524(c)(4) allowed the Debtors 60 days to rescind a reaffirmation agreement. Clearly the current request is outside that time frame. The Debtors argue, however, that since I *should* have conducted a hearing on the Reaffirmation Agreement the deadline for rescission was abated. In support of this argument, the Debtors rely on two cases—*In re Boylan*, 1996 WL 33401349 (Bankr. C.D. Ill Jan. 12, 1996) and *In re Johnson*, 148 B.R. 532 (Bankr. N.D. Ill 1992). However, neither case is applicable to this case because both cases were decided under an earlier version of the Bankruptcy Code that mandated hearings for all reaffirmation agreements.²

Under the current Bankruptcy Code, hearings on reaffirmation agreements are only required if either (a) the debtor is unrepresented, or (b) the reaffirmation agreement on its face indicates there is a presumption of undue hardship and the court determines a hearing is necessary to decide whether reaffirmation should nonetheless be allowed.³

The Debtors were represented by an attorney and there was nothing on the face of the Reaffirmation Agreement to show there was any presumption of undue hardship.

7 case, citing *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir.1989). Since the *McNeal* opinion was entered, there has been a flood of motions to reopen chapter 7 cases seeking retroactive relief.

² Reaffirmation hearings were mandated for all cases filed prior to October 22, 1994, the effective date of the Bankruptcy Reform Act of 1994. The debtors in *Boylan* filed bankruptcy on October 21, 1994; the debtor in *Johnson* filed bankruptcy on September 1, 1987.

³ A hearing is not required if the court can determine on the papers that the presumption of undue hardship has been rebutted. 11 U.S.C. §524(m)(1).

Consequently, if in fact, as the Debtors claim, they incorrectly calculated their expenses, then they should have sought relief under Fed R. Civ. P. 60(b)(1), made applicable to these proceedings by Fed. R. Bankr. P. 9024, which gave the Debtors one year to seek relief.

Laches also bars the relief sought. The elements of common law laches are:

(1) 'there must be conduct on the part of the defendant, or on the part of one under whom he claims, giving rise to the situation of which complaint is made'; (2) 'the plaintiff, having had knowledge or notice of the defendants' conduct, and having been afforded the opportunity to institute suit, is guilty of not asserting his rights by suit'; (3) 'lack of knowledge on the part of the defendant that plaintiff will assert the right on which he bases his suit'; and (4) 'injury or prejudice to the defendant in event relief is accorded to the plaintiff, or in event the suit is held not to be barred.'

Trevett v. Walker, 89 So. 2d 998, 1000 (Fla. 3d DCA 2012) (quoting *Van Meter v. Kelsey*, 91 So. 2d 327, 330–31 (Fla. 1956)). There is no question that the Debtors knew about the alleged error and not only did the Debtors fail to take any steps to correct their alleged error, they continued to make payments to Chase for four years. There was no reason for Chase to assume that the Debtors were not going to continue to perform under their loan agreement. Notwithstanding that Chase has stood silent and has not actually raised this defense to the relief requested, I will not sanction this type of conduct by the Debtors by granting them relief to which they are not legally entitled.

Conclusion

Four years after discharge, the Debtors sought to eliminate a reaffirmation agreement they entered into freely. To support their claims, the Debtors suggest that an error, whether made by the Debtors themselves or by their counsel, masked a presumption of undue hardship and they must be given the opportunity to show that this debt does in fact create an undue hardship. However, it is clear that the Debtors are not

motivated by concern that their alleged error has caused, or will cause, harm to their financial well-being. The Debtors never sought relief from this error within the 60 days the Bankruptcy Code provides; the Debtors never sought relief from this error within the one year the Bankruptcy Rules provide. Indeed, the Debtors have managed to make payments on this loan for four years. The Debtors have filed this motion solely in an effort to take advantage of the *McNeal* decision by the Eleventh Circuit, but they cannot do so without repudiating an agreement that they have no legal right to repudiate.

Accordingly, the Debtors' Motion to Rescind is DENIED.

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Copies furnished to:
Timothy Kingcade, Esq.

Attorney Kingcade shall serve a copy of this Order upon all parties in interest and file a Certificate of Service with the Clerk of Court.