



SO ORDERED.

SIGNED this 14th day of July, 2007.


LEIF M. CLARK
UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court
Western District of Texas
San Antonio Division

IN RE

PHILIP ANTHONY DUENEZ & CRISNA
GUADALUPE DUENEZ

DEBTORS

BANKR. CASE NO.

07-50475-C

CHAPTER 7

ORDER DENYING APPROVAL OF REAFFIRMATION AGREEMENT

CAME ON for hearing the foregoing matter. Mr. Philip Anthony Duenez proposed to reaffirm a community debt arising from a credit card account with Chase Bank USA, N.A. The court set the reaffirmation agreement because it appeared to represent an undue hardship for the debtors, based on the debtors' income and expenses as they appeared on their Schedules I and J. Mrs. Crisna Guadalupe Duenez and debtors' counsel appeared at the hearing. The creditor's counsel (who received notice) did not appear, nor did he request to appear telephonically (a request that is routinely granted in such circumstances).

Part D of the reaffirmation agreement represented that the debtors' income was \$1750 a month, and their expenses (other than the proposed repayment) were \$1650, leaving a spare \$100,

more than enough to cover the proposed \$50 a month payment on the reaffirmed credit card debt. However, the debtors' schedule J showed monthly expenses of \$4,052, and income of only \$1,716.55 net. Those expenses included a home mortgage payment of \$1,185, a car payment of \$445 (a car in San Antonio is a necessity, because of the lack of the sort of public transportation found in cities such as Chicago, Boston, New York, or Washington, D.C.), and monthly food costs of \$400 for a family of 5. No explanation of the discrepancy between Part D and Schedule J was filed, though one is required by Interim Bankruptcy Rule 4008 (adopted as a local rule in this district). The reaffirmation agreement was filed and uploaded by Mark Schulz, attorney for the creditor.

As is detailed in the companion opinion filed on the joint motion for an extension of time for Chase to file a dischargeability complaint, the reaffirmation agreement was executed by the debtor in order to avoid the threatened dischargeability litigation, which the debtors had no practical way of defending because they could not afford to hire a lawyer to represent them. Mrs. Duenez testified at the hearing that she knew that they could not afford to make the payments, but that they felt they had no choice. The court has ruled that the motion for extension of time is denied, because no valid cause was shown for granting an extension, other than to extort this improvident reaffirmation agreement with the threat of baseless litigation.

The reaffirmation agreement should not be approved. Notwithstanding Part D, the debtors are clearly unable to afford even these modest payments. Moreover, they realize no benefit (such as the retention of a vehicle secured by a debt), other than being spared having to fight threatened baseless litigation which they cannot afford. The court ruled in its memorandum decision that using the threat of meritless litigation to extort reaffirmation agreements is not only not cause for granting

an extension of the dischargeability complaint deadline, but also may contravene Rule 9011.

Section 524(m)(1) provides that a court may deny approval of a reaffirmation agreement that represents an undue hardship, on notice to all affected parties. Chase Bank USA, N.A., through its counsel of record, was notified of this hearing, but did not appear. The reaffirmation agreement is not approved. In addition, counsel for Chase Bank is on notice that filing a reaffirmation agreement that contains gross misrepresentations of fact (as does Part D of this agreement) may constitute a violation of Rule 9011. The schedules and statement of affairs are a matter of public record, and so were available to counsel for Chase Bank to examine. The explanation required by Interim Rule 4008 was not filed – an omission that further exacerbated the misrepresentation of the debtors’ ability to perform this agreement. Future filings of this sort will result in the consideration of Rule 9011 sanctions against the creditor, creditor’s counsel, or both.¹

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¹ Debtors’ counsel is not free from blame here, as she also signed off on the agreement, and certified that the agreement did not represent an undue hardship. There is somewhat less blame to lay here, however, in that the debtors found themselves over a barrel, as it were, and debtors’ counsel would had to have either refrained from signing the agreement at all, or prepared to contest the creditor’s threats with no assurance of ever being paid for her efforts. Nonetheless, debtors’ counsel in such situations should consider carefully at the least the propriety of signing any reaffirmation agreement that facially represents an undue hardship, especially when the numbers on Part D do not square with the debtors’ sworn representations in Schedules I and J. *See In re Cain*, No. 07-50600-C, 2007 WL 1558616 at *1 (Bankr. W.D. Tex. May 29, 2007).