

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 03-17584
)
TRACIE RUCKER,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Creditor Anthony Wright moves to reopen this case to file a judgment entry in a related adversary proceeding. (Docket 13). The ground for reopening is that the debtor Tracie Rucker defaulted on an agreed order entered in that adversary, thus entitling the creditor to a final judgment. The debtor objects. For the reasons stated below, the motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

FACTS¹

Creditor Anthony Wright filed an adversary proceeding against the debtor alleging that a debt she owed to him was nondischargeable.² On March 12, 2004, the parties entered into an agreed order granting the creditor a \$5,000.00 judgment which was to be paid at \$250.00 a month

¹ The court held an evidentiary hearing on July 8, 2005. Anthony Wright and Tracie Rucker testified.

² Adversary proceeding 03-1295.

until paid in full. The order provided that the debtor should send the funds to her attorney in time for the attorney to mail them to the creditor no later than the 25th of each month, time was of the essence, and failure to mail the payment by the 25th would be a default. The order also provided that on default, judgment would be entered against the debtor for \$13,808.10 plus collection fees and costs incurred after a stated date.

The debtor made 11 payments, five of which ranged from a few days to a few weeks late. The creditor complained to the debtor's counsel each time a payment was late. The debtor last made a payment on March 11, 2005. She testified that she has been ill, out of work, and unable to make the payments. She did not have the missing funds at the time of the hearing or a specific time when they would be available.

THE POSITIONS OF THE PARTIES

The creditor argues that the debtor breached her payment agreement, thus entitling him to reopen the bankruptcy case to file a judgment for the default amount in the adversary proceeding. The debtor argues that she is not in default based on the doctrines of waiver and estoppel. Specifically, she contends that because the creditor accepted late payments, he is barred from relying on the timely payment provision to show a default. Without a default, there is no basis for a new judgment and thus no reason to reopen the case. The creditor responds that he did not waive the right to timely payments.

DISCUSSION

A court may reopen a closed bankruptcy case to accord relief to the debtor or for other cause. 11 U.S.C. § 350(b). The court must "consider the equities of each case with an eye

toward the principles which underlie the Bankruptcy Code.” *In re Kapsin*, 265 B.R. 778, 780 (Bankr. N.D. Ohio 2001) (citing *Mendelsohn v. Ozer*, 241 B.R. 503, 506 (E.D. N.Y. 1997)).

In this case, the debtor agreed to a payment schedule that she did not meet. Because the agreed order provided without exception that time was of the essence, the debtor cannot rely on the agreed order itself to excuse the late payments. She turns instead to the doctrines of waiver and estoppel to give her leeway.

Under Ohio law:

. . . waiver is a voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where one is not bound to speak.

White Co. v. Canton Transp. Co., 2 N.E.2d 501, 505 (Ohio 1936). The debtor has the burden of proving waiver by showing a “clear, unequivocal, decisive act” by the creditor. *Id.* at syllabus 4. The evidence in this case does not support such a showing. Far from voluntarily giving up the right to be paid on time, the creditor complained to the debtor’s counsel every time a payment arrived late. Also, by the time of the hearing, the debtor was four months behind in payments. Even if the creditor waived his right to receive the payments exactly on the date due, he did nothing to show decisively that he had agreed to wait more than four months for payment.

The doctrine of estoppel is similarly unavailable to the debtor. The Ohio Supreme Court recognizes equitable estoppel as “prevent[ing] relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.” *Chubb v. Ohio Bureau of Workers’ Comp.*, 690 N.E.2d 1267, 1270 (Ohio 1998)

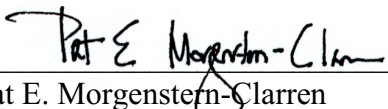
(citing *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 641 N.E.2d 188, 196 (1994)). The debtor did not prove that the creditor induced her to believe that he would accept late payments (or no payments) and also failed to prove that she changed her position in reasonable reliance on any such facts. In sum, the debtor did not prove any defense that would prevent the creditor from declaring a default under the agreed order.

The agreed order provides that on default the creditor is entitled to judgment in the higher amount. As the debtor is in default, this constitutes cause to reopen the case to permit the creditor to submit the judgment. The motion will, therefore, be granted.

CONCLUSION

For the reasons stated, the motion to reopen the bankruptcy case is granted and the opposition is overruled. A separate order will be entered reflecting this decision.

Date: 28 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

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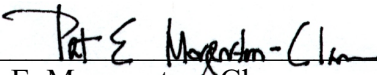


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TRACIE RUCKER,) Chapter 7
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Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, Anthony Wright's motion to reopen the case is granted and the opposition is overruled. (Docket 13). The case will be open for a period of 10 days after the date on which this order is entered, solely to permit Anthony Wright to file his judgment in adversary proceeding 03-1295. The clerk's office is directed to close the case when that period expires.

IT IS SO ORDERED.

Date: 28 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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