Dated: February 06 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-38429
	)	
Michael DuMonte and	)	Chapter 7
Melanie DuMonte,	)	
	)	Adv. Pro. No. 05-3049
Debtors.	)	
	)	Hon. Mary Ann Whipple
Christopher Laudenslager, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
Melanie Rai DuMonte, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION TO ENFORCE SETTLEMENT

The court held a hearing on Defendants Melanie DuMonte's and Michael DuMonte's Motion to Enforce Settlement ("Motion") [Doc. # 21]. Counsel for the parties each appeared in person. Defendants contend that an agreement was reached with Plaintiffs, settling all claims and counterclaims relating to Plaintiffs' Complaint to Determine Dischargeability and to Deny Discharge. Plaintiffs, on the other hand,

contend that the agreement is unenforceable because Defendants failed to tender the settlement proceeds in a timely manner. The parties had the opportunity to present testimony and documentary evidence at the hearing. In addition, Defendants were granted fourteen days to present their attorney's affidavit as further evidence in support of their motion and Plaintiffs were granted seven days thereafter to reply or request a further hearing. Counsel's affidavit was timely filed [Doc. # 30] and Plaintiffs have filed no further reply or request for hearing. Having considered the testimony and evidence, as well as the arguments of counsel, the court finds that a settlement agreement exists and will order Defendants to provide notice of their duty under the agreement to dismiss their claim objecting to discharge in accordance with Fed. R. Bankr. P. 7041.

FACTUAL BACKGROUND

The following facts are not in dispute. On March 10, 2005, a verbal offer to settle all claims in this case was made by Plaintiffs' attorney. The offer, which was verbally accepted by Defendants, provided that the parties would dismiss all claims and counterclaims and that Defendants would pay Plaintiffs $2,500 within thirty days of the March 10 offer. The settlement proceeds, however, were not tendered by Plaintiffs within thirty days. Instead, on April 11, 2005, Defendants delivered the settlement funds to their attorney. At that time, Defendants' attorney held the funds in trust, as it was his understanding that he was to wait to receive a written settlement agreement from Plaintiffs' attorney to be executed by Defendants and returned with the settlement check.

By letter dated May 4, 2005, Plaintiffs' attorney inquired of Defendants' attorney regarding the status of Defendants' income tax refunds, which the parties' attorneys had discussed would be used to pay the settlement. [Doc. # 21, Ex. A]. He requested that Defendants' attorney advise his office as to the status of those refunds "so that we can settle this matter in a timely fashion." [*Id.*]. On May 12, 2005, Plaintiffs filed a status report in this case stating that a settlement has been agreed to but that an additional fifteen to thirty days was needed to route a Judgment Entry to all parties and their counsel for approval. [Doc. # 12]. In a letter to Defendants' attorney dated May 26, 2005, Plaintiffs' attorney stated that "unless the DuMonte's are able to promptly carry through with their end of the agreement, my clients will be intending to proceed with their Complaint." [Doc. # 21, Ex. B]. [1]

[1] The court surmises *only* from the timing of events shown by the record that, after not having been paid the debt they were owed, Plaintiffs were upset to learn that Defendants were able to pay $8100 to settle disputes and claims with the Chapter 7 Trustee, including claims of a pre-petition preferential transfer to an insider, around the same time as they appeared to be dragging their feet as to Plaintiffs' claims and settlement thereof. *See* Case No. 04-38429, Doc. #42, May 16, 2005. The court would understand Plaintiffs' frustration if it exists. But that is not a relevant fact or a proper legal basis to refuse to perform

In a letter sent to Plaintiffs' counsel and dated May 26, 2005, Defendants' attorney enclosed a trust check in the amount of $2,500 and indicated that the Plaintiffs were not to negotiate the check until the dismissal entries are filed and the case is closed. [*Id.*, Ex. C]. Plaintiffs, however, refused to perform under the settlement agreement, stating as their basis for such refusal that Defendants failed to comply with the agreement by not tendering the settlement proceeds within thirty days of Plaintiffs' settlement offer. The settlement check was later returned to Defendants' attorney.

LAW AND ANALYSIS

A settlement agreement is a binding contract that is subject to substantive state contract law. *Edwards v. Hocking Valley Community Hosp.*, 87 Fed. Appx. 542, 550 (6th Cir. 2004) (citing *Marshall v. Beach*, 143 Ohio App.3d 432 (2001)); *Samra v. Shaheen Business and Investment Group, Inc.*, 355 F. Supp. 2d 483, 494 (D.D.C. 2005). The settlement agreement at issue in this case was formed in Ohio and is subject to Ohio contract law. *See Edwards*, 87 Fed. Appx. at 550.

Notwithstanding the fact that the agreement was not reduced to writing, the parties do not dispute that a settlement agreement was in fact reached in this case. *See Arnold Palmer Golf Co. v. Fuqua Indus., Inc.*, 541 F.2d 584, 587-88 (6th Cir. 1976) (applying Ohio law and stating that a valid settlement agreement exists provided the parties understood the terms of the agreement and intended to be bound by its terms, even though the agreement was not reduced to writing at that time). Nor do they dispute that the terms of the agreement were that the parties would dismiss their claims or counterclaims against each other in exchange for Defendants' payment of $2,500 to Plaintiffs within thirty days of Plaintiffs' March 10, 2005, settlement offer. Finally, the parties do not dispute that Defendant failed to tender the settlement proceeds within the thirty-day period as agreed upon. The issue before the court is whether, under the parties' settlement agreement, time was of the essence or, in other words, whether payment within thirty days was a material term of the agreement, the breach of which would excuse Plaintiffs' performance under the contract. *See Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376, 378 (1993) (explaining that the meaning of the phrase "time is of the essence" is that the performance by one party at the time specified in the contract or within the period specified in the contract is essential in order to enable him to require performance from the other party). For the reasons that follow, the court finds that it was not.

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under the settlement agreement. Nor, to their credit, have Plaintiffs made such an argument to the court. The court notes that Plaintiffs will also be entitled to share in the distribution of assets recovered by the estate on a pro rata basis in accordance with their proof of claim, which will have to be amended upon consummation of the settlement.

It has long been held in Ohio that "time is not of the essence unless it has been made so by the express terms of the contract, or if the parties have treated it as such, or the nature of the contract requires it." *Brock v. Hidy*, 13 Ohio St. 306, at syllabus ¶ 1 (1862); *Shullo Constr.Co. v. Miller*, 2 Ohio App. 2d 177, 180 (1965); *Top Roc Precast Corporation v. E.S. Canfield Co.*, 1982 WL 5721, *1 (Ohio App. 1982); *Rudy v. Bodenmiller* , 1990 WL 205109, *8 (Ohio App. 1990); *Gardner v. Partners*, 1997 WL 799710 (Ohio App. 1997). "If time is not of the essence and the obligor has substantially complied with the terms of the contract, the obligee's duty to perform is *not* discharged." *Carney*, 66 Ohio St. 3d at 378-79 (emphasis in original). Thus, in *Gardner*, the court found that time was not of the essence where the parties' agreement required a real estate closing to take place not later than one month after the exercise of an option to purchase but did not specify that time was of the essence and where the nature of the contract did not make time a critical factor. *Gardner*, 1997 WL 799710 at *3; *see also Shullo*, 2 Ohio App. 2d at 180 (finding that sales agreement did not make time of the essence simply by providing that the sale was to close on or before a specified date).

In this case, there is no evidence that time was of the essence with respect to the parties' settlement agreement. Time was not made essential by an express term of the agreement. And neither the nature of the contract nor the circumstances surrounding the contract indicate that time was of the essence. As late as mid-May, well after the thirty-day period stated in the settlement agreement, Plaintiffs still acknowledged that they had a settlement agreement with Defendants and recognized Plaintiffs' right to tender the settlement proceeds pursuant to that agreement. Defendants delivered the settlement funds to their attorney on April 11, 2005, just two days after the thirty-day period referred to in their agreement. Although the funds were not immediately tendered to Plaintiffs due to some misunderstanding between counsel regarding the preparation and execution of a written settlement agreement, Defendants' attorney enclosed the settlement check in a letter to Plaintiffs' attorney dated May 26, 2005. On that same date, Plaintiffs' attorney had requested by letter that Defendants "promptly carry through with their end of the agreement." [Doc. # 21, Ex. B].

In light of the foregoing, the court finds that time was not a material term of the parties' settlement agreement and that Defendants substantially complied with the terms of that agreement by delivering the settlement funds to their attorney on April 11, 2005, and by their attorney tendering the funds to Plaintiffs by letter dated May 26, 2005. As such, Plaintiffs' duty to perform under the agreement is not discharged. *See Carney*, 66 Ohio St. 3d at 378-79.

While the court finds that an enforceable settlement agreement exists, one more issue requires attention. Plaintiffs' complaint seeks both to except the debt owed to them from discharge under 11 U.S.C. § 523 and to deny Defendants a discharge altogether under 11 U.S.C. § 727. The parties' settlement requires Plaintiffs to dismiss their claims objecting to discharge as well as their dischargeability claims. Courts differ dramatically on the treatment of settlements of discharge objection claims, with some courts refusing on a blanket basis to permit settlement of § 727 objections. *E.g.*, *In re Levine*, 287 B.R. 683 (E.D. Mich. 2002). Other courts approach each settlement individually, evaluating carefully the agreement, the totality of the circumstances and often, even where it is a creditor's objection and not the trustee's, the best interests of the estate. *E.g.*, *Lindauer v. Traxler (In re Traxler)*, 277 B.R. 699 (Bankr. E.D. Tex. 2002)(approval of § 727(a) proceeding is within the discretion of the court–discussing three views of such settlements). Court concerns about and scrutiny of such settlements stem from the reasoning that a discharge is not a commodity for negotiation and sale as a matter of public policy. *Bank One v. Kallstrom (In re Kallstrom)*, 298 B.R. 753, 758-59 (B.A.P. 10th Cir. 2003). Settlement of a discharge objection involving payment of consideration to only one creditor and not for the benefit of all creditors appears on its face to be the improper and potentially even criminal, *see* 18 U.S.C. § 152(6), sale of a discharge for acting or forbearing to act. *Kallstrom*, 298 B.R. at 758-59; *see also* Advisory Committee notes to Fed. R. Bankr. P. 7041. But where, as here, a § 523 dischargeability objection is joined with a § 727 discharge objection, courts tend to find that there is less likelihood of prohibited conduct and more leeway for a settlement that involves payment directly to one creditor instead of to the estate as a whole. *Kallstrom*, 298 B.R. at 760.

This court finds that it does have the discretion under the Bankruptcy Code and Rules to evaluate settlements of § 727 claims and to allow them to proceed in appropriate circumstances. Fed. R. Bankr. P. 7041. There must at a minimum be notice and full disclosure of the settlement as required by Rule 7041 of the Federal Rules of Bankruptcy Procedure in order to assure that the policies of the Bankruptcy Code and the best interests of the estate are being met. *Id.* Thus the parties' agreement may not be enforced as it relates to Plaintiffs' duty to dismiss their claims objecting to discharge absent compliance with Rule 7041, which provides "that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing such terms and conditions which the court deems proper." The court will order Plaintiffs to provide the notice required under Rule 7041 and, absent any

objection to Plaintiffs dismissing their claims objecting to discharge, Defendants' Motion will be granted.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that on or before 14 days from the date of this memorandum of decision, Plaintiffs shall file and serve on the Chapter 7 Trustee and the United States Trustee, as well as on any creditor who has filed a proof of claim or requested notice in the underlying Chapter 7 case of Defendants, notice of the terms of the settlement and intended dismissal of their claim objecting to Defendants' discharge, with a specification appearing thereon that any objection to dismissal of the discharge objection shall be filed and served within 10 days after service of the notice.