UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

IN RE:	)	CHAPTER 13
	)	CASE NO. 03-12205-JDW
JILL AMANDA ROUSE,	)	
	)	
DEBTOR.	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Debtor: Jeanie K. Tupper
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For Guarantor: Alfred N. Corriere
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MEMORANDUM OPINION

This matter comes before the Court on Debtor's motion to modify a confirmed plan and Albany Bank & Trust's objection to that motion. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(A). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

Debtor Jill Rouse filed a Chapter 13 petition and proposed plan on September 29, 2003. Albany Bank & Trust ("ABT") filed an unsecured claim for $17,147.72. ABT's claim is based on a note on which Debtor's deceased husband was a co-maker. S. Donald McClure, a friend of Debtor's husband, had executed a guarantee on the note for $10,000. The guarantee provided in part as follows: "[N]o act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder." (Obj. to Mod. of Plan, Ex. B, ¶ 1.)

ABT filed an objection to confirmation of Debtor's plan on December 29, 2003. The plan was confirmed on June 1, 2004, and provided a 0% dividend to unsecured creditors. On January 31, 2005, Debtor filed a motion to modify the plan. The modification proposes to separately classify ABT's claim and pay $10,000 without interest "to protect co-debtor." It makes no specific mention of the guarantee or Mr. McClure's liability. ABT objected to the modification. The Court held a hearing on the objection on March 21, 2005.

During the hearing, counsel for both parties indicated that prior to confirmation, they

had discussed and agreed to a plan provision to pay ABT $10,000 in exchange for ABT releasing Mr. McClure from all liability under the guarantee. ABT's counsel stated that he believed the confirmed plan reflected the change and had closed his file on the case. He did not realize the plan was unchanged until ABT told him it had not received any payments under the plan. He alerted Debtor's counsel to the lack of payments in December 2004.

Debtor's counsel stated that she did not modify the plan prior to confirmation because she was waiting for written acknowledgment from ABT's counsel regarding elimination of Mr. McClure's liability. She never received such acknowledgment, and no writing was ever made to memorialize the agreement. According to Debtor's counsel, the proposed modification at issue is intended to implement the agreement made prior to confirmation with counsel for ABT.

Conclusions of Law

The purpose of Debtor's proposed modification is to eliminate Mr. McClure's liability as a guarantor. All parties understand this to be the case even though the proposed plan is vague as to who is protected and how. There is no dispute that the parties negotiated an agreement and that counsel for ABT thought the agreement had been implemented.

The circumstances raise a question of bankruptcy law: Can a Chapter 13 plan provision be used to unilaterally alter the contractual relationship between a creditor and a nondebtor guarantor? The question is not relevant if the creditor entered into a separate, binding agreement to alter its rights with respect to the guarantor.

Existence of a Contract

The burden is on the party seeking to enforce the contract–in this case, Debtor–to

prove all the elements of a contract, including assent to its essential terms. TranSouth Fin. Corp. v. Rooks, 269 Ga. App. 321, 324, 604 S.E.2d 562, 564 (2004). The only evidence before the Court on the issue of whether the parties entered into a contract are the statements of counsel for Debtor and ABT. Although neither attorney was under oath, their respective factual allegations were not disputed, and the Court will accept their statements as true.

Under Georgia law, the essential elements of a contract are: (1) parties able to contract; (2) consideration; (3) mutual assent to the terms; and (4) subject matter of the contract. O.C.G.A. § 13-3-1 (1982). The only element disputed in this case is mutual assent. "[I]t is well settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject matter, and in the same sense." Southern Med. Corp. v. Liberty Mut. Ins. Co., 216 Ga. App. 289, 291, 454 S.E.2d 180, 182 (1995) (citations omitted).

For a contract to be formed, an offer must be accepted within a reasonable time unless the offer provides otherwise. Wilkins v. Butler, 187 Ga. App. 84, 84, 369 S.E.2d 267, 268 (1988). "What constitutes a reasonable time in any given case must depend upon its own peculiar facts. It is generally a question for the jury, but in any case of unusual delay it may become a question of law, rather than of fact." Home Ins. Co. v. Swann, 34 Ga. App. 19, 25, 128 S.E. 70, 72 (1925). In Home Insurance, six months was an unreasonable time for accepting an application for fire insurance. Id., 128 S.E. at 73. In Wilkins, one year was an unreasonable time for accepting a settlement offer in a personal injury case. 187 Ga. App. at 85, 369 S.E.2d at 268.

Assuming ABT was the "offeror," Debtor's attempt to accept the agreement eight

months after it was negotiated by seeking to modify the plan is unreasonable. Because the confirmed plan provided for no dividend to unsecured creditors, ABT was receiving no payments during that eight-month period. In addition, if ABT complied with the terms of the agreement it believed to be in force, it could not seek payment from the guarantor. Under either the proposed plan provision or the terms of the guarantee, ABT was limited to $10,000 with no interest. Any delay in recovering that money resulted in a loss of its time value.

Even if the delay in acceptance were reasonable, the parties must be in agreement as to all essential terms of the contract. "The requirement of certainty extends not only to the subject matter and purpose of the contract, but also to the parties, consideration, and even the time and place of performance where time and place are essential." Gill v. B&R Int'l, Inc., 234 Ga. App. 528, 531, 507 S.E.2d 477, 480 (1998) (emphasis added). Thus, if Debtor rather than ABT was the "offeror," a lack of mutual assent as to the time for performance could doom the contract. As explained above, timing is an essential term because it affects the time value of ABT's recovery.

A lack of mutual assent as to the timing of the plan modification is evident from the contradictory actions of the parties. The Court is persuaded that ABT contemplated that the confirmed plan would reflect the new plan provision. In other words, according to ABT's understanding of the terms, Debtor was to modify the plan prior to confirmation. Debtor has demonstrated by waiting until eight months after confirmation to modify the plan that she did not believe timing to be an issue. Or, if Debtor did believe it to be an issue, she did not think a contract had been finalized. Because Debtor did not accept the agreement within a

reasonable time and because the parties did not reach mutual asset as to the terms, no contract was formed.

Permissibility of Proposed Plan Modification

Section 524(e) of the Bankruptcy Code provides that, except in certain circumstances not present in this case, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C.A. § 524(e) (West 2004). The district court has stated that § 524(e) "prohibits release or a post-confirmation stay of the obligations of non-party guarantors." In re Davis Broadcasting, Inc., 176 B.R. 290, 292 (M.D. Ga. 1994); see also In re Sun Valley Newspapers, Inc., 171 B.R. 71, 77 (B.A.P. 9th Cir. 1994) ("The first two plans proposed to release the non-debtor guarantors from obligations to creditors, and therefore violate § 524(e) and are not confirmable.").

In Davis Broadcasting the debtor's Chapter 11 plan included a provision barring creditors from pursuing nondebtor guarantors pending execution of the plan. The creditor did not object to the provision, and the plan was confirmed. After confirmation, the creditor attempted to recover from certain guarantors, who raised the plan provision as a defense. The creditor sought relief from the plan provision. The bankruptcy court denied the relief, and the creditor appealed. Id. at 291-92. The district court reversed, holding that the bankruptcy court has no power to approve a postconfirmation stay of guarantee obligations. Id. at 292. Even the creditor's failure to object did not help the guarantor because "a creditor's express or implied assent to an improper stay does not, and cannot, confer jurisdiction on the Court to provide such relief." Id. Although some courts have held

guarantor release provisions are enforceable if the creditor failed to object to confirmation of the plan, Marine Midland Business Loans, Inc. v. Miami Trucolor Offset Serv. Co., 217 B.R. 341, 345 (S.D. Fla. 1998), those cases are distinguishable because ABT has formally objected in this case.

In Davis Broadcasting, a temporary stay was at issue. In this case, Debtor's proposed modification would impose a permanent injunction on ABT. If the Court is without jurisdiction to effect a temporary stay, it certainly cannot grant permanent relief. Nothing in the Bankruptcy Code gives the Court the power to alter ABT's rights against Mr. McClure

over ABT's objection. Therefore, the Court will deny Debtor's motion to modify her plan.

Subrogation of Rights

By way of a letter brief, Mr. McClure has asked the Court that, in the event it denies modification, he be allowed to pay his guarantee obligation in full, be subrogated to the rights of ABT, and be paid under the plan according to the terms of the modification. Even if it were appropriate for the Court to consider such a request, the Court could not grant it because the Court has not allowed any modification. Consequently, no plan provision provides for payment of the $10,000 at issue. Nothing prevents Debtor from proposing a new plan modification to address this situation, although she may wish to consider whether a separate classification would be permissible in such circumstances.

An Order in accordance with this Opinion will be entered on this date.

Dated this 11th day of April, 2005.

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James D. Walker, Jr.
United States Bankruptcy Judge

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ORDER

In accordance with the Memorandum Opinion entered on this date, the Court hereby DENIES Debtor's motion for modification of plan after confirmation.

So ORDERED, this 11th day of April, 2005.

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James D. Walker, Jr.
United States Bankruptcy Judge