

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
EDWARD G. MASCOLL,	)	Case No. 95-00354
	)	(Chapter 7)
Debtor.	)	
_____	)	
	)	
AIRLINES REPORTING CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No.
	)	99-0057
EDWARD G. MASCOLL,	)	
	)	
Defendant.	)	

DECISION RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The court will grant the motion of the defendant Mascoll for summary judgment on the pleadings for the following reasons.

I

Mascoll commenced his bankruptcy case in 1995 and received a discharge in the same year. No adversary proceeding was commenced against him to declare any debt nondischargeable prior to the expiration in 1995 of the deadline for filing a complaint under 11 U.S.C. § 523(c) to determine a debt to be nondischargeable under 11 U.S.C. § 523(a) (2), (4), or (6).

The plaintiff, Airlines Reporting Corporation ("ARC"), commenced this adversary proceeding four years later, in 1999. ARC does not claim not to have received notice of Mascoll's bankruptcy case.

Instead, ARC relies upon a repayment agreement the debtor executed in May 1995, which provided in relevant part that Mascoll agreed to make certain payments on ARC's claim against

him and acknowledged that

ARC's claim against you [Mascoll] is nondischargeable in bankruptcy, whether corporate or individual, as arising out of fraud and breach of fiduciary duty, and that you [Mascoll] affirm this obligation in your present bankruptcy action, entitled In re Edward G. Mascoll, No. 95-80354 [sic] (D.C. Bankr.), and any other such action.

Mascoll made payments but later realized that his discharge barred collection of the debt and refused to abide by the repayment agreement. ARC then filed this adversary proceeding seeking to give effect to the acknowledgment in the repayment agreement.<sup>1</sup>

## II

To the extent that the repayment agreement was a reaffirmation agreement, it is ineffective. The agreement was made prior to the entry of discharge as required by 11 U.S.C. § 524(c)(1). But the agreement is unenforceable as a reaffirmation agreement for at least three reasons. First, it failed to comply with the requirements of 11 U.S.C. § 524(c)(2) that

(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in

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<sup>1</sup> The debtor counterclaimed against ARC for contempt, but withdrew the counterclaim one day before the plaintiff replied to the counterclaim. The court treats the "Withdrawal of Countercomplaint" as a notice of dismissal of the counterclaim under F.R. Civ. P. 41(a). So the only claims remaining to be addressed in this adversary proceeding are ARC's.

accordance with the provisions of this subsection[.]

Nor did the repayment agreement comply with the requirement of 11 U.S.C. § 524(c) (3) that

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such agreement[.]

Finally, by announcing that he would not abide by the agreement, the debtor timely rescinded the agreement such that 11 U.S.C. § 523(c) (4) also bars its being enforceable.

### III

Indeed, ARC argues that the repayment agreement was not a reaffirmation agreement. Instead, ARC seeks to rely on the repayment agreement as setting forth an agreement acknowledging that ARC's claims are nondischargeable in his bankruptcy case. From this, ARC argues that Mascoll's discharge injunction is ineffective as to ARC's claims because the discharge only discharged Mascoll "from all dischargeable debts." On this basis, ARC seeks a determination that the debts are unaffected by the debtor's discharge. ARC's frivolous arguments disregard the plain workings of the Bankruptcy Code regarding how a creditor

must proceed in order to prevent the debts owed it from being discharged.

Under 11 U.S.C. § 727(b)

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .

Under 11 U.S.C. § 523(c) (1):

Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, . . . , the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

ARC has not claimed to come within the exception of 11 U.S.C. § 523(a)(3)(B). This is not surprising, as the repayment agreement itself refers to the pending bankruptcy case, and § 523(a)(3)(B) is inapplicable when the creditor "had notice or actual knowledge of the case in time for such timely filing [of a claim] and request [under § 523(c)]." The Bankruptcy Code itself does not spell out the time for filing a § 523(c) request. Instead, F.R. Bankr. P. 4007(c) provides

**(c) Time for Filing Complaint Under § 523(c) in Chapter 7 Liquidation . . . Cases; Notice of Time**

**Fixed.** A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

The Rule 4007(c) bar date for filing a § 523(c) request (in the form of a complaint commencing an adversary proceeding as required by F.R. Bankr. P. 7001 and 7003) expired in 1995. ARC's claim--even if it were by agreement of a character described in 11 U.S.C. § 523(a)(2), (4), and (6)--was discharged because no timely request was filed as required by 11 U.S.C. § 523(c).

#### IV

ARC attempts to cast Mascoll as the villain here by arguing that he failed to carry out an agreement to affirm his debt in the bankruptcy case. This is a distortion of the repayment agreement: the debtor simply agreed that "You [Mascoll] further expressly acknowledge that ARC's claim . . . is nondischargeable in bankruptcy . . . and that you [Mascoll] affirm this obligation in your present bankruptcy." At most, this meant that Mascoll would not contest that his debt was of a nondischargeable character in his bankruptcy case. It did not address who had the burden of going to the bankruptcy court and making a § 523(c) request for a determination of nondischargeability. That burden rested on ARC, as evidenced by F.R. Bankr. P. 4007(c)'s only allowing a creditor to file a motion to extend the time for filing such a complaint.

ARC cannot prevail even if the court adopted ARC's ridiculous interpretation of the repayment agreement as casting an obligation on Mascoll to file a complaint to determine that the debt he owed was nondischargeable. Allowing recovery of damages for breach of such an agreement would still amount to

collection of the underlying nondischargeable debt. If the repayment agreement embodied such a remedy, the repayment agreement would amount to reaffirming the obligation to pay the debt that the debtor agreed was nondischargeable. But as discussed in part II above, the repayment agreement cannot be enforced as a reaffirmation agreement.

If the repayment agreement were treated instead as an entirely new obligation, that would circumvent the protections of 11 U.S.C. § 523(c) regarding agreements to repay debts otherwise discharged. The court must look at the substance of what ARC seeks to enforce, and it is the underlying debt that gave rise to the state civil action and the repayment agreement in the first place. The court cannot allow a pre-petition debt to be transformed "through the alchemy of a settlement agreement" into a post-petition debt unaffected by the restrictions on reaffirmation agreements. United States v. Spicer, 57 F.3d 1152, 1155 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) (addressing whether nondischargeable claim procured by fraud can be converted into dischargeable non-fraud claim by way of settlement agreement).

Finally, ARC claims that the debtor's discharge should be revoked based on his failure to meet his alleged obligation to inform the court of the nondischargeable character of the debt owed ARC. But ARC has not sufficiently alleged fraud in the obtaining of the discharge or any other ground that would warrant the revocation of the discharge. Failure to comply with an agreement to affirm the debt as nondischargeable does not amount to fraud, and is not otherwise one of the grounds listed in 11 U.S.C. § 727(d) for revoking a discharge. Moreover, with exceptions of no relevance here, a complaint to revoke the discharge--depending on the grounds asserted for revocation--must be filed no later than one year after the granting of the discharge or the date the case is closed. 11 U.S.C. § 727(e).

December 14, 1999.

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S. Martin Teel, Jr.  
United States Bankruptcy Judge

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