

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

In re:)	Chapter 7
)	
JAMES LEE THOMASON)	Case No. 09-72339
LISA GAIL THOMASON)	
)	
Debtors.)	

DECISION AND ORDER

On November 12, 2009 SunTrust Bank filed with the Court a Reaffirmation Agreement signed by the Debtors on November 4, 2009 with respect to a second mortgage loan having an indicated current balance of \$25,076.97 held by SunTrust against their residence. Although no signed motion for court approval of such Agreement was filed, because the documentation did not include a certification by Debtors' counsel, the Court scheduled a hearing on December 16, 2009 concerning the matter. At such hearing the Debtors and their counsel appeared. There was no appearance on behalf of the creditor. The Schedules filed by the Debtors represent that their residence is worth \$83,500 and is subject to two mortgage loans, a first in favor of Bank of America in the amount of \$92,206 and a second being the above mentioned mortgage held by SunTrust in the amount of \$25,077, the latter of which is entirely "out-of-the-money" by reason of the Bank of America loan. Although Schedules I and J filed with the petition represent that they have \$16.80 more living expenses and secured debt repayments than income, the documentation filed with the Reaffirmation Agreement asserts that their expenses are lower than stated in Schedule J and that they have \$100 per month available to use to make the \$53 per month payment to SunTrust. In their Schedule J they list \$752 for mortgage payment or rent, but whether this amount includes the monthly payment due SunTrust

is unclear. At the hearing Mr. Thomason testified that he and his wife were current on their SunTrust mortgage obligation.

The Statement filed by Debtors' counsel pursuant to Bankruptcy Rule 2016(b) with the petition indicated that she had agreed "to render legal service for all aspects of the bankruptcy case," expressly including "preparation and filing of reaffirmation agreements and applications as needed," but excluding representation in "dischargeability actions, judicial lien avoidances, relief from stay motions or any other adversary proceeding." Counsel stated at the hearing that she did not wish to certify the Reaffirmation Agreement as Debtors' counsel because of concerns about whether such Agreement was in the Debtors' best interest. Mr. Thomason testified in support of court approval of the Agreement, although he acknowledged that the debt was more than the property was worth, because of the Debtors' joint desire to remain in their home. Debtors' counsel indicated that her review of the loan documentation indicated that there was no "ipso facto" clause making the filing of a bankruptcy case an event of default authorizing foreclosure. In any event, the Debtors' Schedules I and J filed with their petition represent that their living expenses exceed their income and therefore a presumption of undue hardship arises. Mr. Thomason testified as to why he and his wife believed that they would be able to pay the SunTrust monthly obligation and of their strong desire to remain in their home. The Court finds that the Debtors were in fact represented by counsel during the negotiation of the Reaffirmation Agreement. The Court further finds that in their present circumstances the Debtors are able to make the regular monthly payments due to SunTrust upon the obligation. Based on such testimony and other evidence presented, it is hereby

ORDERED

that the motion to approve the Reaffirmation Agreement as presently before the Court between the Debtor and SunTrust Bank is DENIED for the following reasons:

1. Based on the testimony that the Debtors are current on the obligation to SunTrust and it appearing that there is no contractual provision which would authorize SunTrust to foreclose simply by reason of the filing of this bankruptcy case, court approval of the Reaffirmation Agreement would not give the Debtors any right which they don't already have, namely, the right to continue to remain in undisturbed possession of their home, without facing some attempt by SunTrust to foreclose, for so long as they remain current in the regular payments due such creditor.

2. The Court concludes that 11 U.S.C. §§ 524(c), (d), and (k)(5) do not provide for the Court to approve a reaffirmation agreement when the debtor has been represented by counsel during the negotiation of the agreement except in the very limited situation that the attorney has certified that in his/her opinion the "debtor is able to make the payment" even though a presumption of undue hardship has been established. In such a situation it is the responsibility of the Court to determine whether the presumption of "undue hardship" has been "rebutted to the satisfaction of the court" pursuant to 11 U.S.C. § 524(m)(1), and then only if the creditor is not a credit union within the provision of 11 U.S.C. § 524(m)(2). The Code does not authorize the Court to relieve counsel for the debtor of counsel's responsibility under such section when the attorney is not willing to certify but the client still wants to reaffirm. *See In re Calabrese*, 353 B.R. 925 (Bankr. M.D. FL 2006). If the attorney is not willing to certify in the first place, that is supposed to be the end of the matter and the reaffirmation agreement is not legally effective. The Court recognizes that these provisions create a very definite tension between an attorney's

role as counselor to his or her client and the role of advocate to assist the client in accomplishing the client's lawful objectives. The way this section is constructed makes the attorney, in effect, a gate keeper against well intentioned but ill advised reaffirmations of existing obligations, at least in those situations in which the attorney is representing the debtor with respect to such matters. The Court notes, however, that § 524(c) does not impose upon counsel for the debtor any obligation to certify that a reaffirmation agreement is in a bankruptcy debtor's "best interest." Neither is there any such obligation upon a bankruptcy court to make such a determination when dealing with an unrepresented debtor when the debt is a consumer loan secured by real property. 11 U.S.C. § 524(c)(6)(B), (d)(2), and (k)(5). In the event Debtors' counsel does make the certification contemplated by § 524(k)(5) with respect to this obligation, the Court concludes that, even though it concurs in the reservations voiced by Debtors' counsel about whether reaffirmation of this debt is in their best interests, the presumption of "undue hardship" has been rebutted to its satisfaction. The Court points out, however, that neither failure of this Court to approve said agreement nor of counsel for the Debtors to certify precludes the Debtors from continuing to make the payments or SunTrust Bank from continuing to accept payments on this debt from the Debtors. 11 U.S.C. § 524(l). In the event there is any later dispute between the Debtors and SunTrust arising out of this ruling, the Debtors are granted leave of court to re-open their bankruptcy case without payment of the standard re-opening fee and seek relief appropriate to the circumstances.

The Clerk is directed to send copies of this Order to the Debtors; counsel for the Debtors; the Trustee; the office of the United States Trustee; and SunTrust Bank at its address specified in the Reaffirmation Agreement.

ENTER this the 29th day of December, 2009.

William F. Stone, Jr.

UNITED STATES BANKRUPTCY JUDGE

