

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:	:	Case No. 08-59999
Coi S. Gentzel and	:	
Helen L. Gentzel,	:	Chapter 11
Debtors.	:	Judge Caldwell

**MEMORANDUM OPINION AND ORDER DENYING DEBTORS' MOTION AND
AMENDED MOTION TO REQUIRE JP MORGAN CHASE BANK, N.A. TO APPEAR
AND SHOW CAUSE WHY IT SHOULD NOT BE HELD IN CONTEMPT OF COURT
ORDERS, TO DETERMINE DAMAGES FOR BREACH OF SETTLEMENT
AGREEMENT, AND FOR SANCTIONS (DOC. NOS. 173 AND 179)**

This Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law on the above-captioned pleadings filed on behalf of Coi S. and Helen L. Gentzel ("Debtors"). The Debtors request that the Court enforce the terms of a purported agreed order, and issue sanctions based upon alleged violations of the plan confirmation order and discharge injunction. This relief is opposed by the secured and unsecured lender, JP Morgan Chase Bank, N.A. ("Chase"). Based upon the evidence, review of the pleadings and statements of counsel, the Court determines that the Debtors have failed to establish entitlement to the requested relief. A summary of the facts and the bases for the Court's ruling follow.

The Debtors commenced this Chapter 11 proceeding on October 15, 2008. Chase filed a second amended secured claim on December 19, 2008, for \$241,467.57. On March 12, 2010, the Debtors confirmed their First Amended Chapter 11 Plan of Reorganization. The plan divided the Chase debt into a secured claim of \$150,000.00 and an unsecured deficiency claim for the remainder. To track progress toward plan consummation, the Court set a status hearing for September 27, 2010. On September 24, 2010, the Debtors filed a status report detailing what they alleged to be the failure of Chase to correct its records to conform to bifurcation of its claim under the confirmed plan. Essentially, the dispute concerns the effective date for making the requisite changes. As a result of the Report and statements of counsel, the Court set an evidentiary hearing for December 9, 2010.

At that hearing, however, the parties reported settlement of their differences, and recited the terms of their purported agreement into the record. Counsel for Chase stated that there was some confusion with his client regarding the effective date of the plan, and that they would need to adjust the principal balance. To resolve the matter, the parties planned to establish January 1, 2011, as the effective date of the plan. Chase would apply the payments it had already received to the adjusted principal balance on the effective date. Counsel for Chase stated that his client would reimburse Debtors for the quarterly Chapter 11 fees paid to the United States Trustee, and for the Debtors' attorney's fees, which were estimated to be \$1,500.00. Counsel for the Debtors concurred with these statements, and anticipated that the case would be ready for a final decree by the end of January, 2010.

In the months following their report of a settlement to the Court, the parties engaged in negotiations regarding the terms of an agreed order. The only evidence of these negotiations adduced at trial, was an email exchange between Debtor's counsel James E. Nobile, and Chase's former counsel, Edward J. Boll, III. The parties appear to have disagreed as to the amount of the United States Trustee and Debtors' legal fees which Chase should pay.

Approximately a year and three months passed without the submission of the promised agreed order. On March 30, 2012, Chase filed a Notice of Impasse Regarding Submission of Agreed Order and Motion to Enforce Settlement, or in the Alternative to Set Mediation. This Notice indicated that the parties had failed to come to an agreement. On May 1, 2012, the Debtors filed a motion seeking the entry of a final decree and the administrative closing of this case, subject to resolution of the conflict with Chase. The Court granted Debtors' motion on August 8, 2012. On September 25, 2012, approximately two years after Debtors initially reported the conflict with Chase, the Debtors filed the instant motion.

First, the Debtors seek damages for breach of the purported settlement with Chase, even though an agreed order was never submitted by the parties and entered by the Court. When a matter has been reported settled prior to or at a hearing, it is expected that each party has agreed to the resolution of the matter, and no further discussion or negotiation of key terms is necessary. The existence of this opinion is ample proof that the parties failed to resolve the key terms of their agreement, and did not have a meeting of the minds when they represented to the Court the dispute was settled. If this matter was fully resolved prior to the December 9, 2010, hearing, or litigated on that date, the parties would not be engaged in the instant dispute, more than two years after the fact. Reporting a settlement that has not been finalized or fully agreed upon cannot be condoned. Such conduct damages a client's interests, and raises the risk of future costs and litigation.

Courts have inherent authority to implement written and oral settlement agreements, based upon state contract law. *Union Nat'l Mortg. Co. v. Porrello (In re Porrello)*, 386 B.R. 206, 208-209 (Bankr. N.D. Ohio 2008). *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152-153 (6th Cir. Ohio 1992). In Ohio, "... an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract..." *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 3 (2002). Essential elements include "... an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration..." *In re Porrello*, 286 B.R. at 209. Where there is no meeting of the minds, a settlement agreement is unenforceable. *Id.*

The Court finds and concludes that the purported settlement agreement cannot be enforced under Ohio law. This is best evidenced by the pleadings of the parties, the statements of counsel regarding the discussions that occurred after the Court's December 9, 2010, hearing, and the evidence presented regarding those discussions. The payment of attorney fees and United States Trustee fees was an essential term to the alleged agreement. The email exchange between counsel demonstrates that the matter was far from being resolved. At the December 9, 2010, hearing, the parties expressed that they did not know the exact amount of fees to be paid. All evidence subsequent to that hearing shows that there was never mutual assent regarding fee payment amounts. This failure is fatal to the formation and enforceability of the purported settlement agreement.

Second, the Debtors request sanctions based upon: (1) violation of the discharge injunction, and (2) violation of the Court's Order Confirming Chapter 11 Plan. To establish a violation of the discharge injunction, the Court must first find that Debtors received a discharge. In the case of an individual, "...confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan..." unless, after notice and a hearing, the Court orders otherwise for cause. 11 U.S.C. § 1141(d)(5)(A).

In this case, the Debtors' plan states that "...[u]pon Confirmation, all claims against Debtors shall be discharged to the extent permitted by § 1141 of the Code...." This language alone, does not meet the due process requirements of section 1141(d)(5)(A). *See, e.g., In re Detweiler, 2012 WL 5935343 (Bankr. N.D. Ohio 2012)*. Absent the appropriate notice, hearing, and finding of cause, Debtors could not have received a discharge until all plan payments were made.

In the absence of a discharge, the Court cannot find Chase in contempt for violation of the discharge injunction. Debtors cited Section 524(i) of the United States Bankruptcy Code as independent grounds for contempt. However, that section makes a willful failure to credit payments received under the plan a violation of the discharge injunction under section 524(a)(2). As discussed earlier, however, the Debtors have not received a discharge. In addition, this Order does not speak to the issue of any alleged stay violation only raised during closing arguments by Debtors' counsel.

The Court now addresses the assertion that Chase may be sanctioned for violation of plan terms. Until January of 2011, statements sent by Chase to the Debtors indicated a principal balance due in excess of \$235,994.39 and 6.25% interest. Beginning with the January 2011 statement, Chase reduced the principal balance to \$150,000.00, and the interest rate of the loan to 5.5%. Throughout the year 2011, and into 2012, statements issued by Chase reflected a variety of balances and interest rates. In Debtors' eyes, as of the September 1, 2012 mortgage statement, the principal balance due was overstated by \$1,952.55. The last mortgage statement presented at trial is dated January 23, 2013, and shows a principal balance due of \$132,469.85. Debtors' summary indicates that, as of January 15, 2013, the principal balance due should have been \$130,723.44.

During this same post confirmation period, Debtors made a series of payments to Chase pursuant to the terms of the plan. Debtors acknowledge that checks dated August 14, 2009, September 15, 2009, October 15, 2009, and June 14, 2010 were not cashed by Chase. With the exception of these four checks, Debtors have sent a check to Chase for \$921.13 each month since August of 2009, each of which Chase has cashed. Debtors, however, have not made distributions to Chase on the unsecured portion of its claim, and have not paid real estate taxes or insurance required under the mortgage.

The plan requires Debtors to make certain monthly distributions to Chase on account of its secured claim and annual distributions on its unsecured claim. However, the plan does not expressly require Chase to make changes to its books or prohibit sending statements to the Debtors. In addition, the Debtors' calculations concerning the correct principal balance owed on Chase's secured claim rely upon the effective date of the plan used in the parties' purported settlement agreement, not in the plan itself.

Chase should have acted more quickly and consistently to make adjustments based upon the plan terms. On the other hand, the Debtors have not made all required payments to Chase under the confirmed plan, and have not paid real estate taxes or insurance required under the mortgage. These circumstances do not warrant sanctioning Chase. Indeed, the real dispute in this case appears to be the amount of legal fees and expenses payable to Debtor's counsel, and not the modest mortgage balance discrepancies. As detailed above, even according to the Debtors' records as of September 1, 2012, the parties were only separated by \$1,952.55. The excessive passage of time and accrual of legal costs is a direct result of the parties' failure to make sure the matter was truly settled on December 9, 2010.

On these bases, the Court **DENIES** Debtors' Motion to Show Cause.

IT IS SO ORDERED.

Copies to:

Default List