

2011 IL App (2d) 101221-U
No. 2-10-1221
Order filed October 11, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

C&W ASSET ACQUISITION, LLC,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 08-AR-431
)	
JOSEPHINE BALACHIA-ZAPALIK)	
and SCOTT ZAPALIK,)	Honorable
)	Bruce R. Kelsey,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: Pursuant to *In re Turner*, 156 F.3d 713 (7th Cir. 1998), a creditor's signature is not required for a reaffirmation agreement to be valid. We also held that the trial court's determination that there was a valid reaffirmation agreement was not against the manifest weight of the evidence.

¶ 1 Defendants, Josephine Balachia-Zapalik and Scott Zapalik, appeal from a judgment of \$27,764.88 principal and \$22,627.48 interest against them and in favor of plaintiff, C&W Asset Acquisition, LLC. Plaintiff sued defendants for breach of a bankruptcy reaffirmation agreement that was executed by defendants and was drafted, but not signed, by a creditor that was plaintiff's predecessor in interest. Defendants argue that, under the rule in *In re Turner*, 156 F.3d 713 (7th Cir.

1998), a bankruptcy reaffirmation agreement must be signed by the creditor to be valid and that the document that they executed was, for this reason only, not a valid reaffirmation agreement. We disagree that *Turner* makes a creditor signature a requirement where the creditor's agreement with the terms of the reaffirmation is undisputed. We therefore hold that the reaffirmation agreement was valid, and we therefore affirm the judgment in favor of plaintiff.

¶ 2

I. BACKGROUND

¶ 3 On March 5, 2008, plaintiff filed suit against defendants for the amount due on a note associated with a home equity line of credit originally granted by Old Kent Bank. Defendants did not have an ownership interest in the property, rather, defendant Scott Zapalik's mother had title. The complaint alleged that in 1999 defendants had filed for Chapter 7 bankruptcy protection and in 2000 had executed a reaffirmation agreement that preserved the terms of the Old Kent loan. It further alleged that defendants failed to make the payments required under the reaffirmation agreement and that Old Kent's successor bank, Fifth Third Bank, had sold its interest in the obligation to plaintiff.

¶ 4 Exhibits to the complaint included the original loan documents and the reaffirmation document. The reaffirmation document has a stamp showing that it was filed in the bankruptcy court for the Northern District of Illinois on March 10, 2000. The document bears the signatures of defendants and, in an area requiring the signature of the debtors' bankruptcy attorneys, that of Vito Evola. The agreement has lines for the bank's attorney to sign and date the agreement, but those lines are empty. Nothing on the document shows who prepared it or who filed it in court.

¶ 5 Defendants answered the complaint. They did not, at that point, deny the validity of the reaffirmation agreement.

¶ 6 An arbitration panel awarded plaintiff \$27,099.68, and defendants filed a timely rejection of the award.

¶ 7 Plaintiff moved for summary judgment. Defendants responded, arguing that, under the rule in *Turner*, a reaffirmation agreement is valid only if *agreed to* by all parties. They asserted that no evidence existed that the bank had agreed to the reaffirmation. Defendants attached an affidavit in which they stated that, although neither specifically remembered executing the reaffirmation, the signatures appeared to be theirs.

¶ 8 Plaintiff replied. It asserted that counsel for Old Kent and later Fifth Third, Bruce K. Shapiro, had kept notes that said that he had executed the agreement and had sent it to Evola for filing with the bankruptcy court. In an affidavit attached to the reply, Shapiro averred that Evola had contacted him about the possibility of reaffirmation of the Old Kent loan, and Shapiro had said that Old Kent, which was then in the process of being merged into Fifth Third, was “agreeable to allowing the Zapaliks to reaffirm their debt, and consented and agreed to same.” Based on that “request” by Evola, he “executed a Reaffirmation Agreement as agent for Fifth Third Bank and provided the original executed version to Attorney Evola for filing.” Because his practice was to dispose of documents more than five years old, he did not expect to find a copy of the agreement in his files. His knowledge of the agreement was based on his “notes [he] maintain[ed] in electronic format.” His standard practice was to execute reaffirmation agreements only after the debtors had executed them and then to return them to the debtors’ attorneys for filing with the court.

¶ 9 The court denied the motion for summary judgment, and the matter went to a bench trial. Shapiro testified for plaintiff. His testimony was consistent with his affidavit. He emphasized that he had no independent recollection of the reaffirmation agreement and was testifying based on his

notes; he said that defendants' names were familiar to him. The notes were admitted into evidence, but no evidence envelope is part of the record on appeal.

¶ 10 Shapiro testified that Fifth Third's practice was to notify him when one of its loans was involved in a bankruptcy. His normal practice was to offer the debtors a reaffirmation agreement that restated the terms of the original agreement. He would draft the agreement using a template document. He recognized the agreement filed with the court as one based on his template. His notes showed that a delay had occurred in defendants' execution of the agreement; Evola had told him that this was a result of Scott Zapalik having been hospitalized. The delay resulted in a number of calls between Shapiro and Evola. Evola told Shapiro that the agreement would be signed by March 1, 2000. A note made by Shapiro's secretary said that the document had been filed as of March 10, 2000. Shapiro said that he could not explain why his signature was not on the filed document. Shapiro testified that "there's no question" that Fifth Third agreed to the terms of the reaffirmation agreement.

¶ 11 Shapiro also testified that the terms of his representation of Fifth Third allowed him to execute such agreements after reviewing the terms with the bank. When debtors did not agree to reaffirm a secured debt, his practice was to seek modification of the automatic stay of bankruptcy so that the bank could seek possession of the collateral. If debtors did not make the payments required by a reaffirmation agreement, the bank usually would ask him to move to lift the automatic stay. However, the merger of Old Kent into Fifth Third had sometimes produced confusion and communications difficulties.

¶ 12 Evola testified for defendants. He said that, to the best of his knowledge, the creditor or its agent had prepared the reaffirmation document. He knew that he had not prepared it. He brought defendants into his office and explained the proposed agreement. They signed it, and he signed the

counsel's certification. He sent the document back to whomever had sent it to him, and he was not the one who had filed it. He testified that he had never had any conversations with Shapiro.

¶ 13 In closing argument, defendants asserted that, under *Turner*, a reaffirmation agreement is valid only if it has the creditor's signature. They further argued that no evidence existed that the creditor itself had approved the agreement. The trial court concluded that *Turner* does not require the creditor's signature, provided that there exists an agreement between debtor and creditor. The trial court said that defendants had agreed to the reaffirmation, but noted that whether the bank also agreed was less clear because "there's not a good paper trail." The trial court concluded that, based on the evidence and the credibility of each witness, there was a valid reaffirmation agreement. It said that the only question of fact was the amount of interest that had accrued. It ruled that the reaffirmation was valid, the principal was \$27,764.88, and the interest was \$22,627.48.

¶ 14 Defendants filed a timely motion to reconsider. They asserted that no evidence existed that the bank had *agreed* to the reaffirmation. However, the remainder of the motion suggests that their claim was that the only way that the creditor could *effectively agree* to the reaffirmation was by signing it. The court denied the motion, and defendants timely appealed.

¶ 15

II. ANALYSIS

¶ 16 On appeal, defendants argue that the bank's failure to execute the reaffirmation made it a nullity. They assert "that 11 U.S.C. 524(c) [concerning reaffirmations in bankruptcy] and *** *Turner* *** require a reaffirmation agreement to be signed by both parties." They also argue that "there is absolutely no evidence that [the reaffirmation] was ever agreed to by the bank." Defendants additionally contend that plaintiffs actions, specifically its failure to attempt to enforce

the note for a number of years after the bankruptcy proceeding, demonstrates that the debt was discharged in bankruptcy. In response, plaintiff disputes that either *Turner* or the Bankruptcy Code requires a creditor signature; its position is that a creditor's agreement can be shown by other evidence.

¶ 17 The issue of whether section 11 U.S.C. 524(c) requires the signatures of both debtor and creditor is one of law subject to *de novo* review. See *Melton v. Frigidaire*, 346 Ill. App. 3d 331, 334-35. Although decisions from the federal lower courts are not binding on us in the absence of a decision by the United States Supreme Court, such decisions are considered persuasive. *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 835 (2004).

¶ 18 In *In re Turner*, the Seventh Circuit addressed whether a debtor's unilateral reaffirmation of a pre-petition debt constitutes a valid reaffirmation agreement for the purposes of 11 U.S.C. § 524(c). *Turner*, 156 F.3d at 714. *Turner* involved a consolidated appeal of six Chapter 7 bankruptcy proceedings in which the debtors' law firm filed documents entitled "REAFFIRMATION AGREEMENT" or "AUTOMOBILE REAFFIRMATION AGREEMENT" that purportedly reaffirmed a debtor's installment loan according to its original terms, notwithstanding the bankruptcy proceeding. *Id.* at 715. In each instance, the debtor or debtors signed the reaffirmation but the creditor did not. In addition, the record before the court did not indicate that negotiations had taken place with any of the creditors, and in each instance, the completed agreement was filed without notifying the creditor. *Id.* The bankruptcy court concluded that the reaffirmation agreements were invalid without the creditor's signature evidencing consent to the reaffirmation, and its decision was affirmed by the federal district court. *Id.* at 716-17.

¶ 19 The Seventh Circuit affirmed the bankruptcy court's decision to invalidate the reaffirmation

agreements. The court began its analysis by noting that “the distinguishing feature of a Chapter 7 proceeding for the individual debtor is the discharge: after surrendering his non-exempt property for the benefit of his creditors, the debtor is discharged from what remains of most of the debts he owed as of the date the bankruptcy petition was filed.” *Id.* at 717. However, section 524(c) embodies a significant exception to this principle by permitting a debtor to voluntarily reaffirm a pre-petition debt, and if elected, the debtor will be bound to the debt as if he or she had never gone through bankruptcy. *Id.* Thus, the court explained, because a reaffirmation agreement is the only method by which a dischargeable debt can survive a Chapter 7 discharge, it is in tension with the fresh start that the discharge of indebtedness is intended to give the debtor. *Id.* at 717-18. Therefore, the statute imposes a number of conditions upon reaffirmation designed to ensure that the debtor who elects to reaffirm an otherwise dischargeable debt does so knowingly. *Id.*

¶ 20 The Seventh Circuit then addressed the merits and concluded that the unilateral statements of reaffirmation in the case before it were invalid. In reaching its determination, the Seventh Circuit stated:

“Implicit in [section 524’s] repeated reference to an ‘agreement’—the word is used no less than eighteen times in section 524(c)—is the requirement that the creditor as well as the debtor consent to the reaffirmation. Fundamental to the concept of an agreement is an expression of mutual assent between the two (or more) parties to that agreement. *** As unilateral statements of reaffirmation, filed without notice to the creditors, let alone their consent, the declarations at issue here cannot be understood as the mutual ‘agreement’ that the statute requires.” *Id.*, at 718-19.

The court then addressed the debtors' argument that, by requiring the creditor's signature on the reaffirmation agreement, the lower courts imposed a requirement not provided in section 524(c).

In rejecting this argument, the court stated:

“True enough, section 524(c) does not expressly require the creditor's signature; but it does, as we have discussed, unmistakably envision an ‘agreement’ between the creditor and the debtor. The bankruptcy court believed that the creditor's signature provides the most ready and concrete indicium that the creditor is aware of the reaffirmation and that creditor and debtor alike have assented to its terms. [Citations.] Its reasoning in that regard is unassailable; the same thinking no doubt underlies Bankruptcy Form B 240, which includes a line for the creditor's signature, as well as the local bankruptcy rules and forms in a number of districts that expressly require the creditor's signature on the reaffirmation agreement.” *Id.*, at 719-20.

The court further elaborated in a footnote on the debtor's argument regarding whether a creditor's signature is necessary, stating:

“We note that the bankruptcy court apparently did not treat the lack of a creditor's signature to be wholly dispositive of the validity of the reaffirmation. *** [T]he court ultimately did approve the reaffirmation executed by [one pair of debtors] once their creditor *** withdrew its objection. [Citation.] The debtors' focus on the need (or not) for the creditor's signature in fact obscures the larger point that they attempted to reaffirm their debts without the knowledge or consent of their creditors. That the law recognizes one-signature contracts in certain settings is of no help to these debtors, therefore, because it is still expected that the parties have come to some type of *agreement*. Without so much

as notice of the debtor's wish to reaffirm, a creditor cannot be deemed to have given its consent." (Emphasis in original.) *Turner*, 156 F.3d at 720 n.7.

¶ 21 Although *Turner* was primarily concerned with whether a debtor's unilateral reaffirmation of a pre-petition debt constitutes a valid reaffirmation, we find it persuasive to the issue of whether a creditor's signature is necessary for a reaffirmation agreement to be valid. The Seventh Circuit's holding can be summarized as (1) that a reaffirmation agreement must be an *agreement* between or among the affected parties; and (2) that bankruptcy courts *may make* creditor signatures a requirement. Here, defendants have not cited any rule of the Bankruptcy Court for the Northern District of Illinois creating such a requirement, nor does anything in the record suggest that such a rule existed. Therefore, the absence of a signature on the reaffirmation document is not fatal to its validity. Accordingly, pursuant to *Turner*, proof of the reaffirmation document's validity depends only on proof that the bank agreed to the reaffirmation.

¶ 22 In the current matter, sufficient proof exists that the bank agreed to defendant's reaffirmation of the loan. Shapiro testified that the reaffirmation document filed with the bankruptcy court was a product of the template that he used in his office. The reaffirmation agreement was signed by defendants and then returned to Shapiro, and then later filed with the court. Shapiro further testified that there was no question that the bank approved of the reaffirmation. Thus, unlike *Turner*, there was evidence of the bank's assent to the reaffirmation agreement.

¶ 23 In reaching our determination, we reject defendants' reliance on *In re Lindley*, 216 B.R. 811 (Bankr. N.D. Ill. 1998) as a further source for the proposition that a creditor's signature is required for a reaffirmation agreement to be valid. *Lindley* is simply an instance of the court recognizing the need for the creditor's assent: "For a reaffirmation 'agreement' to be valid, both the creditor and the debtor must *consent*." (Emphasis added.) *Lindley*, 216 B.R. at 816. "[U]nless a reaffirmation

agreement is signed or at least authorized by it, a creditor knows nothing about the so-called ‘agreement’ and may even be unaware that a bankruptcy has even been filed, and unaware that it did not have to accept payment.” *Lindley*, 216 B.R. at 817. The *Lindley* court implied a preference for creditor-signed reaffirmation agreements, but did not suggest that an agreement lacking a signature is invalid when agreement is shown by other means. It is thus consistent with the Seventh Circuit’s holding in *Turner*.

¶ 24 Defendants’ second contention on appeal is that the bank’s failure to take any collection action from the time of defendants’ 1999 bankruptcy filing until the 2008 filing of this suit “[e]stablish[es] that the Zapalik’s [*sic*] debt was discharged in bankruptcy.” Although unclear from the briefs before this court, defendants appear to challenge the trial court’s factual finding that a reaffirmation agreement existed between the parties, and therefore, the debt was not discharged in bankruptcy. Illinois law is well settled that “A trial court’s factual findings will not be reversed unless they are against the manifest weight of the evidence.” *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 688 (2010). Here, the trial court expressly found that based on the evidence and the witnesses’s testimony, which the trial court found to be credible, there was no doubt a valid reaffirmation agreement existed. As noted above, the trial court could have reached this conclusion based on Shapiro’s testimony that there was “no question” Fifth Third agreed to the reaffirmation agreement. It was the trial court’s role in the bench trial to assess the credibility of witnesses, and we will not reweigh the evidence. See *Bohne v. La Salle National Bank*, 399 Ill. App. 3d 485, 501 (2010). Thus, because the trial court was presented with evidence regarding whether Fifth Third agreed to the reaffirmation agreement, its factual conclusion that Fifth Third assented to the reaffirmation agreement and the loan survived defendants’ bankruptcy proceeding was not unreasonable, arbitrary, or not based on the evidence. *Wildman, Harrold, Allen*

& *Dixon v. Gaylord*, 317 Ill. App. 3d 590, 599 (2000)(“A trial court’s judgment is against the manifest weight of the evidence when its findings appear to be unreasonable, arbitrary, or not based on the evidence”).

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment in favor of plaintiff.

¶ 27 Affirmed.