

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

152

NORTHERN DIVISION

UNPUBLISHED OPINION

---

In re )

WENDELL CRAIG CLARK dba )  
CLARK-MONSON and WENDELL )  
CRAIG CLARK aka CRAIG CLARK, )  
individually, and SHERLENE )  
LARSEN CLARK dba CLARK-MONSON, )  
and SHERLENE LARSEN CLARK, )  
individually, )

Debtors. )

---

Bankruptcy Case No. 81C-01228

In re )

WILLIAM DONALD CLARK dba )  
CLARK-MONSON and WILLIAM )  
DONALD CLARK, individually, )  
and GLENNA M. CLARK dba )  
CLARK-MONSON and GLENNA M. )  
CLARK, individually, )

Debtors. )

---

Bankruptcy Case No. 81C-01230

WILLIAM DONALD CLARK dba )  
CLARK-MONSON and WILLIAM )  
DONALD CLARK, individually )  
and WENDELL CRAIG CLARK )  
dba CLARK-MONSON and )  
WENDELL CRAIG CLARK, )  
individually, )

Plaintiffs. )

-vs- )

JRP, LTD., )

Defendant. )

---

MEMORANDUM DECISION AND ORDER

#### APPEARANCES

Robert L. Neeley of CAMPBELL & NEELEY, Ogden, Utah, for the debtors and plaintiffs; and Richard R. Medsker, Ogden, Utah, for the creditor and defendant.

#### CASE SUMMARY

The question before the Court is whether the debtors' post-discharge agreement with the creditor was a reaffirmation agreement made in violation of the provisions of § 524(c) of the Bankruptcy Code or whether it constitutes a new contract for which new consideration was given by the parties and which is, therefore, not subject to those provisions. The Court finds that debtors, Wendell Craig Clark and William Donald Clark, entered into a new agreement for new value not subject to the provisions of § 524(c).

#### FINDINGS OF FACT

1. Wendell Craig and Sherlene Larsen Clark, husband and wife, dba CLARK-MONSON, filed a joint petition under Chapter 7 of the Bankruptcy Code on April 14, 1981 (Bankruptcy Case No. 81C-01228).

2. William Donald and Glenna M. Clark, husband and wife, dba CLARK-MONSON, filed a joint petition under Chapter 7 of the

Bankruptcy Code on April 14, 1981 (Bankruptcy Case No. 81C-01230).

3. The debtors in both cases were discharged on June 16, 1981.

4. In each case an Order Approving Trustee's Report of No Distribution and Closing the Estate was filed. The order in Wendell and Sherlene's case (81C-01228) was filed on October 23, 1981, and the order in William's and Glenna's case (81C-01230) was filed on November 30, 1981.

5. In William's and Glenna's case, debtors' attorney Robert L. Neeley moved this Court, on December 21, 1983, to reopen case number 81C-01230 to allow the debtor to file a motion for an order to show cause why the creditor, JRP, Ltd., should not be held in contempt for violation of § 524(c) of the Code. The order reopening the case was signed on January 16, 1984, and notice was given thereof on January 23, 1984, on which date James Z. Davis was appointed trustee. By February 29, 1984, the debtor had filed no motion for an order to show cause and for that reason on that date the case was again closed.

6. In Wendell's and Sherlene's case, debtors' attorney Robert L. Neeley moved this Court, on December 21, 1983, to reopen case number 81C-01228 to allow the debtor to file a motion for an order to show cause why the creditor, JRP, Ltd., should not be held in contempt for violation of § 524(c) of the Code.

The order reopening this case was signed on January 9, 1984, and notice was given thereof on January 13, 1984. James Z. Davis was appointed trustee on January 16, 1984.

7. On August 3, 1984, Wendell's and Sherlene's attorney, Robert L. Neeley, filed a motion for an order to show cause. Accompanying this was a memorandum of points and authorities and an order, denominated notice of hearing, setting the hearing before this Court on the order to show cause on September 6, 1984 at 10:45 a.m. Through an inexplicable inadvertence the attorney for the debtors signed the order and notice which should have been signed by the Court and, to further complicate matters, the motion for the order to show cause was mistakenly denominated "Order to Show Cause," and for that reason was inadvertently signed by the Court.

8. These complexities were reduced to de minimus issues by virtue of the hearing held pursuant to these pleadings on September 6, 1984 at which both parties through their attorneys made their appearances and argued their respective positions.

9. No testimony was adduced at the hearing nor were any affidavits filed. The uncontroverted representations pertinent to the resolution of the issue before the Court are as follows:

(a) The debtors received their respective discharges in bankruptcy in 1981.

(b) Thereafter the debtors continued to assert an ownership interest in certain residential real property located in Davis County, Utah.

(c) This property was encumbered with a lien of a creditor whose claim against the debtors personally had been discharged in 1981 by virtue of the debtors' bankruptcy; however, the lien against the debtors' property had not been avoided and continued to attach thereto as an encumbrance.

(d) Shortly after their June 16, 1981 discharge in bankruptcy, debtors approached the creditor with the intent of obtaining a release of the lien.

(e) The creditor agreed to release the lien only if the debtors promised to pay the creditor \$10,345.00, which amount included the creditor's claim which had been discharged in the bankruptcy cases.

(f) The debtors agreed to this arrangement, and an agreement was entered into by the parties on July 17, 1981. The agreement was signed by William Donald Clark, personally, and Wendell Craig Clark, personally.

(g) In making this agreement, no attempt was ever made to reaffirm the indebtedness before the Bankruptcy Court.

(h) The debtors eventually defaulted on their obligations under this agreement, and the creditor filed suit in state court and obtained a state court judgment.

(i) The debtors now seek an order of this Court declaring the post-discharge agreement a nullity as violative of the provisions of § 524(c) of the Code.

#### CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact, the Court now makes its Conclusions of Law in this matter:

1. Section 524(c) applies only to "agreements between a holder of a claim and the debtor, where the consideration for the agreement is, in whole or in part, based on a debt that is dischargeable in a case under Title 11."

2. The agreement of July 17, 1981 was not based upon consideration which, in whole or in part, was based on a debt that is dischargeable in a case under this title. Before the July 17, 1981 agreement was executed, the debtors had no personal obligation to the creditor; the creditor held a lien against the property of the debtors and could foreclose its lien interest to the extent of the value thereof, whatever that value was; but the creditor could not, in the event that foreclosure did not yield sufficient value to cover the debt, collect any deficiency from the debtors, for their personal liability had been discharged in the bankruptcy cases. By virtue of the July 17th agreement, the debtors sought and obtained a reversal of these liabilities. For whatever reasons they had, they were not satisfied with having an

encumbrance on their residence, while being personally free of debt to this creditor; instead, they had sought to remove the creditor's encumbrance on their real property by personally obligating themselves to this creditor in the sum of \$10,345.00.

3. The July 17, 1981 agreement required the debtors to give completely new value (the promise of the money) in exchange for completely new value (the release of the lien).

4. There is no evidence before the Court that the creditor failed to release the lien or that it would be possible to put this creditor back into the same position it was before the lien was released.

5. Moreover, because there is no evidence before the Court as to the value of the creditor's lien interest in the real property, the Court cannot find that the consideration given by the creditor was not "valuable" consideration; this is so especially in light of the state court's determination that the contract was valid.

6. The Court concludes, therefore, that the agreement of July 17, 1981 between the debtors and the creditor was not subject to the provisions of § 524(c) of the Code.

7. The Court's ruling affects only the case of Wendell and Sherlene Clark (Bankruptcy No. 81C-01228), the other cases having been closed.

**RULING**

Based upon the foregoing Findings of Fact and Conclusions of Law,


IT IS HEREBY ORDERED that, in Bankruptcy No. 81C-01228, debtors' motion for an order declaring the July 17, 1981 agreement unenforceable as violative of the provisions of § 524(c) of the Bankruptcy Code be, and hereby is, denied.

The prevailing party will prepare, within ten (10) days of the date of this decision, an order approved as to form and consistent with the Court's Findings of Fact, Conclusions of Law, and Ruling. In the event that there are objections to the order, such objections shall be filed and a notice of hearing thereon shall be served within twenty (20) days of the date of this decision.

In the event that the order is entered and no objection, pertinent motion, or appeal is filed, the case will again be closed.

DATED this 3 day of March, 1985.

BY THE COURT:

  
\_\_\_\_\_  
GLEN E. CLARK  
UNITED STATES BANKRUPTCY JUDGE