IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| IN RE | : CHAPTER 13 |
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| ALFREDA JOHNSON | : |
| DEBTOR | : BANKRUPTCY NO. 02-34686- SR |

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| ALFREDA JOHNSON | : |
| PLAINTIFF | : |
| V. | : |
| MARGO ROBINSON, A/K/A ROBINSON FINANCIAL | : |
| GROUP, D/B/A ROBINSON FINANCIAL SERVICES, | : |
| AND PIONEER AGENCY, | : |
| AND EQUICRDIT CORPORATION, | : |
| AND FIRST AMERICAN TITLE INSURANCE COMPANY | : |
| AND FAIRBANKS CAPITAL CORPORATION | : ADVS. NO. 02-1427 |
| DEFENDANTS | : |

# OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

**Introduction.**

Before the Court is a pleading entitled *Debtor's Amended Second Motion for Reconsideration of Order Granting Motion to Enforce Alleged Settlement Agreement.* An answer in opposition to this Motion has been lodged and a hearing was held on November 16, 2004. For the reasons hereinafter set forth, the Motion will be denied.

**Background**.

The Debtor filed this bankruptcy case on October 15, 2002. She commenced the above adversary proceeding on December 23, 2002. The gravamen of the Debtor's complaint goes to a mortgage loan she took to finance improvements to her home, and to her contentions 1) that she was defrauded in the course of the loan transaction, and 2) that the Defendants also violated various consumer protection statutes. The Court has had

prior occasion to write about this case, *see In re Alfreda Johnson*, 292 B.R. 821 (Bankr. E.D. Pa. 2003), and a fuller description of the background facts can be gleaned from the Court's prior opinion.

On January 9, 2004, the matter was assigned to mediation under the supervision of Horace Stern, Esquire. Along with it, another litigation in the separate Bankruptcy case of Gertrude Barnes (Bankruptcy Docket No. 02-34684, Adversary Docket No. 02-1266) was also assigned to Mr. Stern for mediation. The reasoning behind the joint assignment was that the two litigations involved the same defendants and raised similar issues. On or about January 30, 2004, the Court-appointed mediator filed a "Mediator's Certificate of Compliance," wherein he recited that a mediation had been held on January 15, 2004, and that a settlement of the Johnson litigation had been reached. The Mediator then, however, filed a "corrected" Certificate of Compliance on February 2, 2004. The mediator's transmittal letter accompanying the corrected certificate stated that counsel for the parties had advised him that the Johnson matter had not yet been settled, although the Gertrude Barnes matter pending before Judge Kevin J. Carey, had been settled.

On May 24, 2004, Defendant Margo Robinson filed a *Motion to Enforce Settlement Agreement.* The Motion recounts the January mediation and recites that "on or before March 19, 2004" an agreement was eventually reached to settle the Johnson Litigation. By letter dated March 19, 2004, (Motion to Enforce, Ex "A") counsel for Defendants Equicredit and Fairbanks Capital Corporation (hereinafter the "Equicredit Defendants" ) confirmed to other counsel his understanding of such fact, and stated that he would prepare the appropriate settlement documents and circulate them for review. By letters dated April 5, 2004 and April 6, 2004 (Motion to Enforce, Ex "B") counsel for the Equicredit

Defendants circulated a revised Settlement Agreement and related documents. The Motion next asserts that the plaintiff, Alfreda Johnson refused to sign the settlement documents. The Motion to Enforce Settlement states that counsel for the Plaintiff had advised counsel for the Movant that the Plaintiff had changed her mind with respect to a certain feature of the settlement agreement; to wit: a release of the "Robinson" defendants. David W. Wolf, Esquire, counsel for the Plaintiff, thereafter filed an answer confirming that his client had indeed agreed to settle the litigation on the terms recited in the written settlement agreement attached to the motion, but that she nevertheless now refused to sign the Settlement Agreement.[1] Counsel's pleading also recited that his client had failed to respond to numerous telephone calls and correspondences seeking an explanation of her position.

The Motion to enforce the settlement agreement was scheduled for hearing on June 22, 2004, but was continued to June 29, 2004, by agreement of all counsel. On June 29, 2004, counsel for the parties appeared, but the Debtor/Plaintiff was absent. Debtor's counsel advised the Court that he had written to his client and specifically advised her of both the original June 22, 2004 hearing, and of the continued hearing on June 29, 2004. Counsel stated that he had had no response from his client.

At the hearing on June 29, 2004, the parties reiterated the foregoing background

[1] The essential terms of the settlement called for a cash payment of $11,000 to the Plaintiff and the reformation of her mortgage obligation into a 30 year term mortgage, at an interest rate of 7%, with a waiver of late fees, penalties, etc.

facts.[2] Counsel for the Plaintiff advised the Court that Ms. Johnson had agreed in principle to the terms of the settlement in March 2004, but that communication with her had broken down since then. (Transcript 6-29-04 at 3) Counsel indicated that in his last conversation with the Plaintiff she had indicated that she did not want to give a release to Margo Robinson, even for the cash payment. *Id*. 3-4

Counsel for the Movant next indicated an intention to call the Plaintiff's attorney as a witness to confirm their mutual understanding as to the status of the matter. As there was no dispute among the assembled attorneys, the Court indicated that it would dispense with that perfunctory exercise, and accept the parties' colloquy with the Court as an "offer of proof" as to what each would testify to if called as a witness. Given the circumstances, the Court further indicated its intention to grant the Motion to enforce the agreement.

At that juncture, the Court had further colloquy with all counsel in response to questions raised over the implementation of the parties' settlement. Specifically, the point was made that because the settlement called, inter alia, for the Debtor's loan to be recast at a reduced rate of interest, new loan documents would be necessary. As the plaintiff had refused to sign the settlement agreement, it was considered probable that she would likewise refuse to sign the loan modification documents. At the direction of the Court, counsel prepared a proposed form of order which both approved the motion to enforce the settlement, and scheduled a further hearing which the debtor would be directed to attend for purposes of signing the settlement agreement and related loan documents. That Order,

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[2] Counsel stressed that his correspondences to Ms. Johnson, sent to her residence address, were never returned as unclaimed or undeliverable (Transcript 6-29-04 at 6)

of July 6, 2004, also put the Debtor on notice that should she fail to appear at the next scheduled hearing (July 13, 2004) the Court would appoint an attorney-in-fact to sign the documents on her behalf. The July 6, 2004 Order was served on the Debtor by regular and certified mail.

Ms. Johnson appeared at the July 13, 2004 hearing, but refused to sign the settlement documents. Ms. Johnson's brief explanation went strictly to the merits of the litigation, and to her assertions that, because she had been "scammed" by defendant, Margo Robinson, she saw no reason to sign anything. At the hearing, Ms. Johnson at no time denied that a settlement of the matter had been reached. She simply appeared to have changed her mind as to the agreement based on her intense animosity toward Defendant, Margo Robinson. After a brief exchange with the Debtor, the Court indicated that, under the circumstances, it would appoint Ms. Robinson's counsel, David W. Wolf, Esquire, as Ms. Robinson's attorney-in-fact, for purposes of implementing the parties' settlement. An Order to that effect was entered on July 27, 2004.

On August 6, 2004, Ms. Johnson filed a Motion for Reconsideration. The Motion was ostensibly filed *pro se*, although the pleading appears clearly to have been ghostwritten for Ms. Johnson. In her pleading Ms. Johnson appeared to acknowledge that an agreement had been struck, but argued that she should not be forced to abide by it, as she was the victim of a fraud. Further, in her motion, Ms. Johnson, professed that she had only just at that time (i.e., August - 2004) come to understand that the "settlement" which she had repudiated could be consummated without her participation.

The Court denied the Motion for Reconsideration, without hearing, by Order dated August 12, 2004, as it was readily apparent that the request in the Motion raised nothing

which had not been raised at the July 13, 2004 hearing. At this junction, Ms. Johnson changed course. She retained a new counsel – David A. Scholl, Esq. – who proceeded to file a document entitled *Debtor's Second Motion for Reconsideration of Order Granting Motion to Enforce Alleged Settlement Agreement*. In this Motion Debtor's new counsel maintained that the Debtor was *unaware* of the hearings of June 29, 2004, and July 13, 2004, (*see* Debtor's second motion, ¶¶ 7,9) and that both the Court, Debtor's former counsel, and opposing counsel as well, were all laboring under a misunderstanding that the Debtor had ever agreed to a settlement of this litigation.[3]

The Debtor requested relief from all of the Court's past orders under F.R.C.P. 59(e) and F.R.C.P. 60(b)(1). The Robinson Defendants filed an answer in opposition to the Debtor's Second Motion for Reconsideration, and a hearing was scheduled for September 21, 2004. That hearing was continued, apparently by agreement of counsel, until November 16, 2004. In the interim, however, the Debtor's present counsel filed the *Debtor's Amended Second Motion for Reconsideration of Order Granting Motion to Enforce Alleged Settlement Agreement.* The Amended Second Motion alleged no new facts, but expanded considerably the basis upon which the Debtor sought relief.

At this juncture, the Debtor's request is for relief from the Court's Order of July 6,

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[3] It is, needless to say, somewhat astonishing for counsel to assert that the Debtor was unaware of the July 13, 2004 hearing since she was present at that hearing. Counsel further makes no response to the presumption that the Debtor received notice of both hearings, being as they were sent to her by first class mail at her address of record. Under the common-law mailbox rule, proper and timely mailing of a document raises a rebuttable presumption that the document was received by the addressee. *Hagner v. United States*, 285 U.S. 427, 432, 52 S.Ct. 417, 419 (1932); *In re Cendant Corporation Prides Litigation,* 311 F.3d 298, 304 (3d Cir.2002). The mailbox rule presumption is not nullified solely by testimony denying the receipt of the item mailed. *See e.g., Commonwealth of Pennsylvania v. Grasse*, 606 A.2d 544, 545 (Pa. Commw.1991).

2004, July 27, 2004 and August 12, 2004 under F.R.C.P. 60(b)(1), on the basis that the Orders were the result of 1) a mistake by Debtor's prior counsel in believing that the Debtor had agreed to a settlement; 2) inadvertence of the *pro se* debtor in failing to appreciate the significance of appearing at the hearing of June 29, 2004; 3) surprise of the Debtor when she belatedly learned that the hearing of June 29, 2004 resulted in a significant Order, and 4) excusable neglect A) on the part of the Debtor's former counsel in mistakenly believing that the Debtor had agreed to a settlement, and B) on the part of the Debtor in not bringing her position to the attention of the Court on or before June 29, 2004.

Alternatively, the Debtor also requests relief under F.R.C.P. 60(b)(2) on the basis 1) the she allegedly learned only on September 15, 2004, that she had allegedly given authority to her counsel to settle this litigation in a March 2004 telephone conversation with an employee in her former counsel's office, and 2) because in a separate bankruptcy case involving the Debtor's friend Gertrude Barnes, a similar adversary proceeding had been filed, which was likewise reported as settled, however, the Court (Carey, J.) declined to enforce the settlement and is instead considering dismissal of the case. The Debtor also requests relief under F.R.C.P. 60(b)(6), arguing that the present circumstances, constitute such "exceptional" circumstances that recourse to F.R.C.P. 60(b)(6) is warranted. Finally, the Debtor requests relief from the Court's Orders of July 27, 2004 and August 12, 2004 under F.R.C.P. 59(e).

An answer in opposition to the Amended Second Motion was filed by the Equicredit Defendants and a hearing was held on November 16, 2004. At this hearing, the Debtor indicated that she had recently reached another separate settlement with the Robinson Defendants, rendering that aspect of the contested settlement agreement moot. The

Debtor, nevertheless, continued to oppose the settlement as between herself and the EquiCredit Defendants, and expressed a desire to offer testimony in support of her position. The Court advised Debtor's counsel that, given the procedural posture of the case, it would first determine whether there was any conceivable vitality to the Debtor's pending Amended Second Motion before proceeding to an evidentiary hearing. At this point, the Court has considered the Debtor's many arguments, but finds itself persuaded by none. Accordingly, the Debtor's motion will be denied in its entirety.

The Court begins by concurring with the Debtor that the circumstances of this contested matter are indeed exceptional, but not in any way which helps her. The Court has rarely witnessed such tenacious efforts to evade an agreement as those now underway before it. There is, indeed, a distinct "throw in everything but the kitchen sink" flavor to the Debtor's Amended Second Motion, and its expanded set of arguments. There is, moreover, now a healthy skepticism on the Court's part as to the Debtor's good faith, having learned that while these proceedings have been pending, the Debtor has separately settled with the Robinson Defendants, (on unknown terms) when it was the Debtor's antipathy toward to the Robinson Defendants which was the initial basis upon which the Debtor had apparently resisted signing the settlement agreement. It appears that after failing to distance herself from the settlement agreement by simply ignoring it, the Debtor now seems embarked on a divide and conquer strategy. Such tactics reflect poorly on both the Debtor and her present counsel. Leaving these observations aside, however, the Court turns to the substance of the Debtor's arguments.

The Court begins by noting that in her present motion the Debtor seeks collective relief from all three of the Orders heretofore entered by the Court. The Court observes,

however, that between the Second Motion and her Amended Second Motion, the Debtor has abandoned her request for relief from the Court's Order of July 6, 2004, insofar as it was predicated on F.R.C.P. 59(e). This is significant, inasmuch as the July 6, 2004 Order is obviously *the* pivotal order. That Order declared the Settlement Agreement valid and granted the Motion to enforce it. The orders which followed were only necessitated because of the Debtor's anticipated obstinacy with respect to performing her obligations.

It is not altogether surprising that the Debtor would narrow her basis for relief, because her initial request for relief from the July 6, 2004 Order was untimely. F.R.C.P. 59(e) provides that a Motion to alter or amend a judgment shall be filed no later than ten (10) days after its entry. In this case, the Debtor's initial "Motion for Reconsideration" was filed on August 6, 2004, well past the ten day limitation period. It seems clear that the Debtor concluded that by simply absenting herself from these proceedings she could avoid the consequences of them. It was apparently only upon learning that the settlement agreement could be implemented over her objection, and without her participation, that the Debtor recognized the need to act. Her strategy, though flawed, is virtually transparent.

The Debtor is thus left to press her essential prayer for relief entirely under F.R.C.P. 60(b). This rule, however, offers her no safe harbor. For all of its verbiage, the Debtor's Amended Second Motion under F.R.C.P. 60(b) is merely a repackaging of her initial Motion under F.R.C.P. 59(e). The Debtor asserts that the settlement was the result of a mistaken impression by her counsel, opposing counsel, and the Court, that she had agreed to a settlement with all of the Defendants. The record does not bear this out.

Debtor's former counsel filed a particularly detailed consenting answer to the original motion to enforce the settlement agreement, yet the Debtor, on notice of it, failed to appear

at the June 29, 2004 hearing at which time the Motion was heard and determined.[4] The Debtor's argument, as this juncture, is that she failed to understand the nature or appreciate the significance of the June 29, 2004 hearing. On the record before it, the Court finds this argument utterly disingenuous. The Court, in short, finds that no mistake has occurred here, nor has there been surprise, inadvertence, or excusable neglect on the part of anyone connected with this compromise. The Court likewise rejects the Debtor's contentions as to newly discovered evidence. The Debtor appears to be upset that her friend, Gertrude Barnes, has apparently been able to secure what the Debtor views as a more favorable outcome in her case. It goes without saying that it would ill serve the administration of justice to permit litigants to lightly change agreed to positions once afforded the advantage of hindsight.

In general, it is well established that "[t]here is a strong judicial policy in favor of parties voluntarily settling lawsuits." *Pennwalt Corp. v. Plough, Inc.,* 676 F.2d 77,80 (3d Cir. 1982); *see also In re Sando*, 30 B.R. 474,476 (E.D.Pa. 1983); *Sellersville Savings & Loan Association v. Kelly,* 29 B.R. 1016, 1018 (E.D. Pa. 1983); *Morris v. Gaspero,* 522 F. Supp. 121, 124 (E.D. Pa. 1981); *Compu Forms Control, Inc. v. Altus Group, Inc.*, 393 Pa. Super. 294, 305, 574 A.2d 618, 624 n.3 (1990) ("'Judicial policy favors the settlement of law suits.'") (quoting *Miller v. Clay Township,* 124 Pa. Commw. 252, 255 (1989)). Furthermore,

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[4] The Court here emphasizes the glaring internal inconsistencies in the Debtor's position vis-a-vis the June 29, 2004 hearing. In her second Motion for Reconsideration the Debtor asserted a complete unawareness of the June 29, 2004 hearing. (*See* Debtor's Second Motion for Reconsideration at ¶ ¶ 7 and 9) In her Amended Second Motion, the Debtor first adheres to her contention that she was unaware of the 6-29-04 hearing (*see* Amended Second Motion at Paragraph 9), but then acknowledges an awareness of that hearing, but an unawareness as to its "nature" (*id.* at ¶ 11), and an unappreciation of the "significance of her attendance."

a trial court has jurisdiction to enforce a settlement agreement made by litigants in a pending case. This jurisdiction is founded on the strong public policy favoring the settlement of disputes and avoidance of costly and time consuming litigation. *E.g., Pugh v. Super Fresh Food Markets. Inc.,* 640 F. Supp. 1306, 1307 (E.D. Pa. 1986); *Rosso v. Foodsales. Inc.,* 500 F. Supp. 274, 276 (E.D. Pa. 1980).

A settlement agreement is contractual in nature; the essential ingredient of a binding agreement is the parties' mutual assent to the terms and conditions of the settlement. *See Main Line Theatres, Inc. v. Paramount Film Distributing Corp.*, 298 F.2d 801, 803 (3d Cir. 1962); *Pugh,* 640 F.Supp. at 1306. Furthermore, "'[a]n agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court, and even in the absence of a writing. " *In re Paolino,* 78 B.R. 85, 89 (Bankr. E.D. Pa. 1987) (quoting *Morris v. Gaspero,* 522 F. Supp. 121 (E.D. Pa. 1981)); *see also In re Conston Corp.. Inc.,* 130 B.R. 449, 454 (Bankr. E.D. Pa. 1991); *see generally Pennwalt,* 676 F.2d at 79 ("[T]he settlement agreement is a contract. ").

"When fairly arrived at and properly entered into, [settlement agreements] are generally viewed as binding, final, and conclusive of rights as a judgment." *In re El Tropicano, Inc.*, 128 B.R. 153, 157 (Bankr. W.D. Tex. 1991) (quoting, inter alia, *Thomas v. Louisiana,* 534 F.2d 613,615 (5th Cir. 1976)). A "settlement agreement is still binding even if it is clear that a party had a change of heart between the time he agreed to the terms of the settlement and when those terms were reduced to writing." *Pugh,* 640 F. Supp. at 1308.

If not routinely enforced by courts, litigants would not enter into settlement agreements. And certainly in civil litigation, even in a bankruptcy forum, there is a strong preference for parties to settle their own differences. *See In re Martin*, 91 F.3d 389, 393

(3d Cir. 1996); *In re Lakeland Development Corp.*, 48 B.R. 85, 90 (Bankr. D. Minn. 1985)

The foregoing principles militate heavily in favor of upholding the agreement in this case and denying the Debtor's Amended Second Motion for Reconsideration.

In closing, the Court notes three things. First, is the Debtor's argument, respectfully interposed, that the Court itself may have been confused as to the Debtor's position. To allay any concerns on that score, the Court makes clear that upon receipt of the initial pleadings relative to the Motion to Enforce the Settlement Agreement the Court recognized, precisely, the nature of the Debtor's contentions. What the Debtor apparently fails to understand is that the Court has rejected these contentions. Put simply, the Court has concluded that the Debtor agreed to settle this case, then changed her mind. Even were it otherwise, the Debtor's cause is foreclosed. Once the ten-day period for filing a Rule 59(e) motion passed, any motion for post-trial relief must be governed by Rule 60. *See Albright v. Virtue*, 273 F.3d 564, 571 (3d Cir. 2001) (holding that ten-day period under Rule 59(e) is jurisdictional). Rule 60 does not allow for the type of challenge that the Debtor now makes. *See* 12 *Moore's Federal Practice* § 59.05[7][b] (Matthew Bender 3d ed.) (arguing that the Court misapplied the law, or misunderstood the parties, does not justify relief under 60(b); rather, this argument should be raised in a timely 59(e) Motion or on direct appeal. 12 *Moore's* at § 60.41[4][b][iii] (recognizing that the Third Circuit does not permit Rule 60(b) to be used for requests for relief from legal error)

The second point the Court underscores is that the Debtor, while intermittently described herein as *pro se*, has at no time been truly *pro se.* To the contrary, the record demonstrates that the Debtor at all times was represented, but that she elected to both disregard communications from her counsel and/or to proceed on her own behalf when she

thought that it would serve her purposes.

Finally, the Court notes that the crux of this dispute goes to the Court's Order of July 6, 2004. The Orders of July 27, 2004 and August 12, 2004 are merely orders which were issued for the purpose of implementing the pivotal Court Order of July 6, 2004. As the Court finds no grounds to disturb its original Order of July 6, 2004, it follows that the implementation Orders should likewise remain in place.

An appropriate Order follows.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: December 2, 2004

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# ORDER

**AND NOW**, upon consideration of the Debtor's Amended Second Motion for Reconsideration of Order Granting Motion to Enforce Alleged Settlement Agreement, the Answer in opposition filed thereto, and after hearing held November 16, 2004, it is hereby:

**ORDERED,** that for the reasons stated in the within Opinion, the Motion shall be and hereby is denied.

By the Court:

Stephen Raslavich
UNITED STATES BANKRUPTCY JUDGE

Dated: December 2, 2004

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