Plan Confirmation with Surrender: How Do You Make It Work? What Do You Do with Mounting Property Taxes, Condo or Homeowners Association Fees, City Grass Liens, etc.? Are 363 Sales the Answer?

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Postpetition Obligations And Liabilities The Debtor May Accrue If The Property Is Not Surrendered

1. Property taxes: In Louisiana, property taxes are in rem obligations. See, La. Const. Art. 7, Section 18. Accordingly, the debtor would have no postpetition liability for property taxes that accrue. If the property taxes remain unpaid, the property will be sold by the parish to the lowest bidder. Property taxes outrank any mortgage obligation and therefore are (almost) always paid eventually. In Texas and some other states, debtors are personally liable for property taxes. See, Texas Tax Code, Section 32.07. Accordingly, a debtor could accrue postpetition liability for property taxes in those states. However, in these states, property taxes outrank mortgages and so are almost always paid out of the proceeds of a foreclosure sale.

2. Grass cutting liens: In Louisiana, property owners can be held personally liable for grass cutting and trash cleanup by the city or parish. See, Louisiana R.S. Section 33:4770.12. The city or parish can also file liens against the property. These liens typically are inferior to the mortgage and thus would be wiped out by a foreclosure sale if there are insufficient funds realized by the sale to pay them. In some states, the city or county has the ability to enforce property maintenance requirements by criminal citation - a woman in Lenoir, Tennessee spent six hours in jail in October 2014 for failure to cut her grass! A bankruptcy discharge will not relieve this sort of civil or criminal liability. However, lenders will often assume responsibility for grass maintenance once the debtor abandons the property. If not, the debtor may still be on the hook for these maintenance expenses.

3. Liability for Tort Claims (Offenses): The debtor does remain potentially liability for

postpetition torts that occur on the property to which he retains legal title. For example, if someone walks on the property the day after a Chapter 7 petition is filed and falls into a hidden sinkhole, the debtor may be liable for that person's damages, despite receiving a discharge thereafter. For this reason, it would be prudent for the debtor to maintain insurance on the property until legal title has been transferred. If the debtor cannot afford to maintain insurance or cannot obtain insurance, see the list of other possible solutions below.

4. Liability for HOA Dues: A particularly tricky situation has arisen over the last few years where the debtor owns a condominium or house in Florida, Las Vegas, Phoenix, or other areas where property prices increased dramatically in the early 2000s only to crash after 2007. In many of these areas, lenders have been reluctant to foreclose on properties or take a deed in lieu, because they want to wait until the property prices increase but do not want the ongoing responsibility of insurance or homeowner's dues. The HOA ("Homeowners' Association) dues typically do not prime the mortgage and the HOAs can hold the unit owners personally liable for those dues. See, e.g., Louisiana R.S. 9:1141.9, 9:1148 (In addition to other remedies provided by law for nonpayment of assessments, HOA can file a privilege against the property which shall be ranked according to its time of recordation); Florida statutes section 718.116. Pursuant to Bankruptcy Code Section 523(a)(16), postpetition HOA dues are excepted from discharge.

Possible solutions if the lender is slow to take back or foreclose on the property:

1. Sale to third party / short sale: A sale of the property to a third party would eliminate the ongoing liability concerns associated with HOA dues or potential tort claims. Over the past few years, numerous individuals and businesses have sprouted up which claim to take problem properties off the hands of their owners. Some of these services are only interested in properties with equity but some may be willing to hold the property while a short sale is negotiated.

2. Transfer to a limited liability entity: Another possible solution is to transfer the property to a limited liability company or corporation to insulate the debtor from postpetition liability. This solution makes sense primarily for more valuable properties because of the additional record-keeping and tax return filing requirements. In addition, such a transfer may be subject to attack from potential plaintiffs arguing undercapitalization.

3. File or convert the case to Chapter 13: Some courts have held that, despite the language of 523(a)(16), a discharge under Chapter 13 will discharge postpetition HOA dues if the debtor intends to surrender the property and no longer occupies it. See, In re Khan, Case No. 14-33248PM (Bankr. D. Md., January 30, 2014); In re Coonfield, Case No. 14-02533 (Bankr. E.D. Wa., September 25, 2014); In re Colon, 465 B.R. 657, 661-63 (Bankr.Utah. 2011); contra, In re Zamora, Case No. 11-51328C (Bankr. W.D. Tex. 2012); In re Beeter, 173 B.R. 108, 122 (Bankr. W.D. Tex., 1994); In re Spencer, 457 B.R. 601, 615 (E.D. Mich., 2011); In re Burgueno, 451 B.R. 1 (Bankr.Ariz., 2011) (relating to individual Chapter 11).

The debtor used a different tactic in In re Rosa, Case No. 13-00630 (Bankr. D. Hi. July 8, 2013) and proposed a Chapter 13 plan that provided that the confirmation order would serve to surrender the condo unit to the lender and transfer title. This provision was inserted specifically to stop the accrual of HOA dues. The bankruptcy court confirmed the plan.

4. Convince HOA to take back the unit: In some situations, the HOA may be willing to take back the unit in lieu of the unpaid dues. The HOA is in a unique position to rent out or resell the unit because of its familiarity with the property. However, for HOAs of developments with numerous unoccupied units, this solution will likely not be successful.

5. Convince the mortgage company to pay / accept liability for the HOA dues: The unit will likely be owned by the lender in the near future, anyway.

6. Convince the HOA to backcharge the mortgage company for the HOA dues: It is unlikely that the HOA will be successful in court in backcharging a lender for dues accrued while the debtor owned the property, although some will try.

7. Convince the HOA to write off the dues: Sometimes, HOAs will realize that it is not possible to get blood out of a turnip and write off all dues for the time period that the debtor owned the property. Convincing the HOA to do this may take a few phone calls from the debtor's attorney.

IN RE: AZHARUL KHAN Debtor
CARROLLAN GARDENS CONDOMINIUM ASSOCIATION Movant
v.
AZHARUL KHAN Respondent
Case No. 11-33248PM
UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND at Greenbelt
Entered: January 30, 2014

PAUL MANNES
U. S. BANKRUPTCY JUDGE

Chapter 13
CORRECTEDMEMORANDUM OF DECISION

Carrollan Gardens Condominium Association ("the condominium") seeks relief from the automatic stay of 11 U.S.C. § 362(a) so as to enable it to file legal action to collect post-filing obligations. The condominium filed a proof of claim for a secured claim in the nature of a statutory lien in the sum of $2,974.43. The proof of claim stated that the monthly condominium fee is $292.43 with a $16.00 late fee if not timely paid. In his opposition, Debtor argues that while the claim of the condominium may not be discharged before consummation of his plan, the stay must continue throughout the pendency of the case as otherwise Debtor's reorganization would be beyond his means. Debtor does not live in the condominium unit. He cannot afford to pay both the fees and his plan payment. He needs to free himself from it in order to continue the

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funding of his confirmed plan. Debtor might have proposed a plan that provided for the transfer of his unit to the condominium in satisfaction of the condominium's secured claim pursuant to 11 U.S.C. § 1322(b)(8). *Cf. In re Bryant,* 323 B.R. 635 (BC E.D. Pa. 2005). That opportunity passed.

This case presents the court with a situation frequently encountered in the world of bankruptcy. Here are two parties, neither one of which has done a thing wrong, engaged in mortal combat. The condominium is entitled to contributions from each of its unit owners for the common good. This is not a case of a creditor extorting usurious interest from a helpless debtor, a debtor seeking to pull a fast one, or a scam artist taking advantage of an unfortunate victim, but rather an effort to enforce the sums due pursuant to a voluntary association. On the other hand, Debtor here has no interest in the unit, does not benefit one iota from its ownership, and would dearly love to be disassociated from all connection to it. The real parties in interest -the secured creditors, or more precisely the senior secured creditor - sit by doing nothing. In a perfect world, the condominium could force GMAC, the holder of the senior lien, to take action and foreclose, returning the unit to the market place inhabited by a new resident who would pay its fees. Better still, the legislature might provide for a senior priority for condominium liens.[1]

No one disputes the valuation of the property. Namely, that it is worth approximately one-third of the total of the claims secured by three liens on the property - a first mortgage securing a claim of GMAC said to be in the sum of $112, 695.00, a judgment lien held by BB&T whose claim is in the sum of $11,413.00, and the condominium lien claim in the sum of $2,973.43. Debtor's confirmed Chapter 13 Plan provides for 60 payments of $95.00 a month and for surrender of the unit to the secured lenders. In confirming Debtor's Plan, the court found that the $95.00 payment represented all Debtor's projected disposable income. However, none of the secured creditors has gone forward with foreclosure, and Debtor cannot compel them to

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accept his surrender pursuant to 11 U.S.C. § 1325(a)(5)(C).[2] *In re Canning,* 706 F.3d 64, 69-

70 (CA1 2013); *In re Brown,* 477 B.R. 915 (BC S.D. Ga. 2012); *In re Arsenault,* 456 B.R. 627 (BC S.D. Ga. 2011); *In re Ogunfiditimi,* 2011 WL 2652371 (BC Md. 2011); *but see In re Harris,* 244 B.R. 556 (BC D. Conn. 2000).

In order to appreciate the dilemma faced by Debtor, and perhaps thousands of others in his shoes, consider the seminal case of *In re Rosenfeld,* 23 F.3d 833 (CA4 1994), holding that a condominium's right to payment for assessments arising post-petition is in the nature of a covenant running with the land and therefore survives a Chapter 7 discharge.[3] This is in accord with the provisions of the Maryland Contract Lien Act, MD. CODE ANN. REAL PROP. § 14-201(b) (2013). The *Rosenfeld* ruling was substantially codified by the following section of the Bankruptcy Code added in 2005:

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> **11 U.S.C. § 523(a)(16)**
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -
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> (16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case[.]

Another addition in 2005 was the following section dealing with discharges in cases under Chapter 13:

> **11 U.S.C. § 1328(a)(2)**[4]
> (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt -
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> (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a)[.][5]

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Because 11 U.S.C. § 523(a)(16) is not specifically listed among the exceptions to a Chapter 13 discharge entered after completion of all of a debtor's payments under a Chapter 13 plan, the *in personam* obligation to pay condominium fees does not survive as an exception to discharge. But, this obligation survives discharge as an *in rem* obligation because it is a covenant running with the land. If

it were otherwise, a debtor could continue to live in a unit after completion of a Chapter 13 plan in perpetuity without the obligation to pay the same fees that neighbors must pay. In that event, 11 U.S.C. § 1328(a)(2) would not only provide a fresh start for the honest debtor but a head start as well, a result generally disapproved. *In re Taylor,* 3 F.3d 1512, 1516 (CA11 1993). When Congress enacted 11 U.S.C. § 523(a)(16) amending the Bankruptcy Code to place personal responsibility for post-Chapter 7 discharge liability, it could have continued the protection from the 1994 Act for debtors in cases where debtors no longer used the condominium unit had it seen fit. It did not.

A ruling that with the entry of a discharge under 11 U.S.C. § 1328(a)(2) the obligation continues as an *in rem* remedy but is discharged as a personal liability is based upon the plain meaning of 11 U.S.C. § 1328(a) that does not include 11 U.S.C. § 523(a)(16) among the exceptions to the discharge entered after plan completion. The *Rosenfeld* ruling was implemented by the enactment of 11 U.S.C. § 523(a)(16) by the 2005 Bankruptcy Code revisions as to cases like it under Chapter 7. However, in cases under Chapter 13 after discharge of pre-petition claims the condominium contract obligation rides through leaving a debtor without personal liability as with consensual liens under long-established law. As the Court said in *Johnson v. Home State Bank,* 501 U.S. 78, 82-83 (1991):

> A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. *See* 11 U.S.C. § 727. However, such a discharge extinguishes only "the personal liability of the debtor." 11 U.S.C. § 524(a)(1). Codifying the rule of *Long v. Bullard,* 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886), the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. *See* 11 U.S.C. § 522(c)(2); *Owen v. Owen,* 500 U.S. 305, 308-309, 111 S.Ct. 1833, 1835-1836, 114 L.Ed.2d 350 (1991); *Farrey v. Sanderfoot,* 500 U.S. 291, 297, 111 S.Ct. 1825, 1829, 114 L.Ed.2d 337 (1991); H.R.REP. NO. 95-595, *supra,* at 361.

See In re Hamlett, 322 F.3d. 342, 349 (CA4 2003).

The existence of a covenant running with the land does not impose personal liability in the absence of privity. The doctrine concerns the liability of assignees, not the original obligor.

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It is generally recognized that there are three requirements that must be satisfied for a covenant to run with the land. First, the covenanting parties must intend to create such a covenant. Second, the covenant must "touch and concern" the land in question. Third, there must be privity of estate between the person claiming the right to enforce the covenant and the person upon whom the burden of the covenant falls. *Greenspan v. Rehberg,* 224 N.W. 2d 67, 73 (Mich. App. 1974). The essence of the covenant and its distinction from a personal covenant is that it is binding on the original covenantor and follows title so as to be binding upon all subsequent holders of title. *Wild Acres Lake Property & Homeowners Ass'n v. Coroneos,* 690 A.2d 794, 796 (Pa. Cmwlth. 1997); *Glendening v. Fed. Land Bank of Louisville,* 44 N.E.2d 251, 254 (Ind. App. 1942) (en banc); *Johnson v. Myers,* 172 S.E.2d 421, 424 (Ga. 1970).

In accord with the *Rosenfeld* decision and prior to the 2005 amendment adding 11 U.S.C. § 523(a)(16), this court opined in the case of *In re King,* 208 B.R. 376, 380 (BC Md. 1997), that:

> [w]hile the issue was not argued, the law is settled that the obligation to pay condominium fees continues after the debtor's discharge. *See*

> *River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld),* 23 F.3d 833 (C.A.4 1994), *cert. denied,* 513 U.S. 874, 115 S.Ct. 200, 130 L.Ed.2d 131 (1994); *In re Whitten,* 192 B.R. 10, 15-16 (Bankr.D.Mass.1996) ("The financial obligations of a unit owner are covenants running with the land.").
> This result is in harmony with the general scheme of bankruptcy. Had Cherrywood sought and obtained an in personam judgment against the debtor, enforcement of debtor's personal liability on that judgment would have been barred by the discharge of 11 U.S.C. § 524(a).

Following *Rosenfeld* and the 2005 Code amendment, personal liability continues after discharge on condominium fees in cases under Chapter 7. But Congress did not include 11 U.S.C. § 523(a)(16) among the exceptions to a Chapter 13 discharge under 11 U.S.C. § 1328(a)(2). It is not for this court to add this exception. Until the discharge is entered, Debtor is stuck for the payment of these fees. This holding differs from that of *In re Spencer,* 457 B.R. 601, 605 (E.D. Mich. 2011) where the court stated:

> The sole issue presented on this appeal is whether Debtor's personal liability for condominium fees assessed after the filing of a petition for relief may be discharged in a Chapter 13 bankruptcy proceeding, pursuant to 11 U.S.C. § 1328(a). With certain exceptions not relevant here, § 1328(a) discharges pre-petition debts upon confirmation and completion of a bankruptcy plan. Debts arising after the petition date, however, are

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> not generally dischargeable in bankruptcy. 11 U.S.C. §§ 101(5), (12), & 1328(a); *In re Hester,* 63 B.R. 607, 609 (Bankr.E.D.Tenn.1986).
> Therefore, the appeal ultimately depends upon whether the post-petition assessments of condominium fees constitute dischargeable pre-petition debts or nondischargeable post-petition debts.[6]

But a covenant running with the land is not a personal obligation of the covenantor. As explained above, the purpose is to bind future assignees. It is not a personal obligation, but as it plainly states runs with the land. The covenant is annexed to the estate and cannot be separated from the land or the land transferred without it.

Courts have found that the relief from the stay of 11 U.S.C. § 362(a) is not required for post-confirmation attempts to collect post-filing condominium assessments, as they are not pre-petition debts. *In re Reynard,* 250 B.R. 241, 244 (BC Va. 2000); *In re Zamora,* 2012 WL 4501680 (BC W.D. Tex. 2012); *cf. In re Schechter,* 2012 WL 3555414 (BC E.D. Va. 2012)(Collection activities must be limited to property of the debtors, not property of the estate, but all post-confirmation earnings are property of the estate under 11 U.S.C. § 1306(a)(2)). This issue was not raised by either party, and the court will not address it.

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Although the stay will be lifted, the court will comment on the state of affairs should Debtor be able to consummate his plan. The pre-filing claim of the condominium would be discharged. Its lien remains of record, not having been avoided. After discharge, 11 U.S.C. § 523(a)(16) will not impose personal liability upon Debtor to continue the payment of condominium assessments, but the charges of the condominium will continue as an *in rem*

obligation. *Cf. In re Colon,* 465 B.R. 657, 662-63 (BC D. Utah 2011). The situation is not unlike that in *Long v. Bullard,* 117 U.S. 617, 620-621 (1886), as described in *In re Hamlett,* 322 F.3d 342, 347-48 (CA4 2003), that liens pass through bankruptcy unaffected. The discharge of the claim does not affect the condominium's rights under the Maryland Contract Lien Act.[7]

An order will be entered in accord with the foregoing.

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Notes:

[1] In Maryland, upon foreclosure, provided certain conditions are met, a portion of a condominium lien not exceeding $1,200.00 has priority over mortgages and deeds of trust recorded after October 1, 2011. MD. CODE ANN. REAL PROP. § 11-110(f)(2) (2013).

[2] *See In re Pigg,* 453 B.R. 728 (BC M.D. Tenn. 2011). This was a case involving an uninhabitable flood-damaged unit that the secured creditor took no action to foreclose upon. The court vacated the discharge, directed the Trustee to sell the property and reordered priority of payment on the property. The result was that the sale expenses were in first priority. The court found that the HOA lien had obtained senior status because the lender had "taken possession" of the property by virtue of its bylaws. The court further found that the parties had consented to this action by their inaction.

[3] When *Rosenfeld* was decided, there was no statutory equivalent of 11 U.S.C. § 523(a)(16). The Bankruptcy Code was amended by the 1994 Bankruptcy Reform Act to add the following exception to a discharge under § 727:

> (16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which—
>
> (A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or
> (B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case.

[4] Section 1328(a)(2) deals with discharges in cases under Chapter 13. If a debtor seeks a "hardship discharge" under 11 U.S.C. § 1328(b) because he is unable to complete his plan payments due to circumstances for which he is not accountable, 11 U.S.C. § 1328(c) makes 11 U.S.C. § 523(a)(16) applicable to the discharge.

[5] Prior to the enactment of BAPCPA in 2005, the exceptions to Chapter 13 discharges after all plan

payments had been made were limited to kinds specified in paragraph (5), (8), or (9) of 11 U.S.C § 523(a).

[6] In *Spencer,* the court also stated:

> The foregoing analysis depends upon Debtor's ability to divest himself of the property. The court presumes Debtor can transfer real property to avoid incurring liability, absent evidence to the contrary. It is not necessary that Debtor be able to sell the property at a price sufficient to extinguish his personal liability on the mortgages encumbering it. To the extent that the mortgage claims are undersecured, they will be bifurcated, with the amount in excess of the collateral value becoming a general unsecured claim. See 11 U.S.C. § 506(a)(1). The same result is reached by a short sale for less than the value of the secured creditors' claims. Absent unusual circumstances that have not been indicated here, therefore, it is within the power of Debtor to divest title of the property in some fashion.

457 B.R. at 614. This court does not have the same confidence that Judge Cleland voices in *Spencer* as to Debtor's ability to shed himself of the responsibility of this white elephant. Like Charlie, he appears doomed to ride forever 'neath' the streets of Boston in the Kingston Trio song. Until he is able to pay both his plan payments and the condominium assessment he must live with this burden.

[7] In *Heffner v. Elmore, Throop & Young, P.C.,* 2012 WL 2138097 (D. Md. 2012), the court stated:

> The Court is not persuaded by Heffner's argument. He attaches undue significance to a section of the Bankruptcy Code the Court finds is wholly irrelevant to this case. Sections 523(a)(16) and 1328(a) are "mutually inapplicable based upon the plain language of the Bankruptcy Code." *In re Spencer,* 457 B.R. 601, 609 (E.D. Mich.2011). By its terms, § 523(a) applies only to discharges under §§ 727, 1141, 1228(b), or 1328(b). It does not apply to a discharge, such as Heffner's, effected under § 1328(a). "When evaluating the dischargeability of debts under § 1328(a), the conditions of discharge set forth in § 523(a)(16) simply do not apply." *Id.*; see also *In re Danastorg,* 382 B.R. 585, 588 (Bankr.D.Mass.2008) ("[S]ection 523(a)(16) is inapplicable to Chapter 13 cases, where the Debtor has an ongoing duty to pay postpetition obligations, such as utilities and condominium fees, as they come due."). The Court declines to infer that by not expressly connecting these unrelated sections, Congress intended to broaden the § 1328(a) discharge to include assessments that are excluded from other types of bankruptcy discharges. *See In re Foster,* 435 B.R. 650, 659 (9th Cir.BAP2010) ("[W]e doubt the omission of § 1328(a) in § 523(a)(16) or vice versa evinces a legislative intent to discharge postpetition HOA dues under § 1328(a) when the debtor uses the cure and maintenance provisions under chapter 13 to stay in his or her property after the order for relief.").

The court respectfully disagrees with this restriction on the § 1328(a) bankruptcy discharge. In the 2005 amendments to the Bankruptcy Code, five subsections of § 523(a) were added to the list of exceptions of the types of debts not discharged upon completion of all payments under a plan. Had Congress the intention to make such payments be the continuing personal obligation of the debtor, it would have included the newly enacted § 523(a)(16).

In re: BRYAN CHARLES COONFIELD
and ANNETTE ELIZABETH COONFIELD, Debtors.
Case No. 14-02533-FPC13
UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF WASHINGTON
September 25, 2014

MEMORANDUM DECISION

I. BACKGROUND

In 2008, Bryan and Annette Coonfield purchased a condominium located in Lake Bellevue Village. The condominium is subject to a recorded declaration that provides the Lake Bellevue Village Homeowners Association with a lien for any unpaid homeowner assessments and is subject to a deed of trust securing a mortgage loan held by Bank of America, N.A. In December of 2012, Mr. and Mrs. Coonfield abandoned the condominium and stopped paying assessments to the Homeowners Association. However, Mr. and Mrs. Coonfield still hold legal title to the condominium because neither the Homeowners Association nor Bank of America have foreclosed.

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In July of 2014, Mr. and Mrs. Coonfield filed a petition under chapter 13 of the Bankruptcy Code and proposed a plan that provides for the transfer of the condominium's title to Bank of America[1] and omits any provision for payment of ongoing assessments made by the Homeowners Association. Both Bank of America and the Homeowners Association object to the proposed transfer of title and the Homeowners Association further objects to the absence of a provision for the payment of ongoing condominium assessments.[2]

II. ISSUES

The issues resulting from the two objections are:

1. Whether the debtors can force Bank of America to accept title; and

2. If not, whether the debtors' plan can be confirmed if it does not provide for the payment of ongoing assessments.

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III. DISCUSSION

A. The Debtors Cannot Force the Transfer of Title.

Bank of America and the Homeowners Association correctly assert that Mr. and Mrs. Coonfield cannot force Bank of America to accept title to the condominium. In Washington, to complete a transfer of real property, the transferee must accept the transfer.[3] Here, where Bank of America is unwilling to accept the proposed transfer, the debtors cannot force the lender to take title. Nonetheless, as discussed below, Mr. and Mrs. Coonfield need not divest themselves of legal title to avoid personal liability for ongoing assessments.

B. Ongoing Association Assessments are Dischargeable.

The Homeowners Association cites *Foster v. Double R Ranch Association.*, a decision rendered by the Ninth Circuit Bankruptcy Appellate Panel, as authority for the proposition that Mr. and Mrs. Coonfield's chapter 13 plan must provide for ongoing assessments to the Homeowners Association so long as the Coonfields hold title to the condominium.[4] The *Foster* court addressed a situation where a debtor

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continued to reside in his condominium and had no intention to surrender it.[5] Based on those facts, the Bankruptcy Appellate Panel imposed a rule that it descriptively entitled: "you stay, you pay."[6] Given that Mr. Foster continued to enjoy

the benefits of ownership, this court finds the *Foster* ruling compelling on equitable grounds. However, the facts here are distinct in a critical respect.

In cases such as this one, where chapter 13 debtors have surrendered all interests in a condominium but still hold bare legal title, courts are split on whether ongoing assessments are dischargeable under 11 U.S.C § 1328(a). Those courts that comport with the Homeowners Association's view assert that assessments are a result of covenants running with the land and conclude that ongoing assessments are non-dischargeable.[7] In contrast, other courts view the obligations as flowing from contract and conclude that they are dischargeable.[8] While both approaches establish

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the existence of an obligation, neither appropriately addresses whether such obligations are dischargeable.[9]

To resolve the issue of whether Mr. and Mrs. Coonfield must include ongoing association assessments in their plan, the court must determine whether the assessments are a debt owed to the Homeowners Association as contemplated by the discharge provision under 11 U.S.C. § 1328(a). If so, then the assessments are dischargeable - if not, Mr. and Mrs. Coonfield remain personally liable and must provide for the assessments in their plan.

To begin the analysis, the court looks to the language contained in the discharge provision under 11 U.S.C. § 1328(a) which states ". . . the court shall grant the debtor a discharge of all *debts* . . ." (emphasis added) with certain exceptions inapplicable here. Section 101(12) of the Bankruptcy Code defines "debt" as a "liability on a claim." In turn, section 101(5)(A) defines "claim" as "[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable,

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secured, or unsecured." As the Supreme Court noted, "Congress chose expansive language in both definitions."[10]

In light of these broad characterizations, it appears that the terms necessarily encompass the obligation at issue here. The Homeowners Association possesses its claim by virtue of Mr. and Mrs. Coonfield acquiring title to the condominium and subsequent assessments are a consequence of, and mature from, the act that gave rise to such claim. Thus, absent the debtors' pre-petition act of taking title, the Homeowners Association would not have a claim. As correctly noted by one court, obligations to Homeowners Associations "are a pre-petition claim because they arose upon the Debtor taking title to the property, which occurred pre-petition. The post-petition assessments that are at issue here are merely the 'contingent', 'unmatured' portion of that prepetition claim."[11] Thus, this court concludes that the claim against Mr. and Mrs. Coonfield for association assessments arose pre-petition and includes obligations for ongoing assessments.[12]

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The express language contained in 11 U.S.C. § 523(a) leads to the same conclusion. By its terms, the discharge exceptions under section 523(a) do not apply to section 1328(a) - the discharge provision relevant here; however, section 523(a) remains relevant to section 1328(a) for other reasons. Section 523(a) states that "[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any *debt*-" (emphasis added) and goes on to list several debts excepted from discharge, including debts for ongoing association assessments under paragraph (16). By including association assessments on this list, Congress not only explicitly identified these obligations as "debts" that give rise to "claims" by operation of section 101(5), but, as a corollary, identified them as dischargeable absent a specific exception.[13] In

light of Congress' designation, such debts are dischargeable under 11 U.S.C. § 1328(a).

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A contrary interpretation of the law divests 11 U.S.C. § 523(a)(16) of significance. If personal liability on such obligations arise post-petition as the Homeowners Association urges, section 523(a)(16) is rendered meaningless and simply restates a principle already infused in bankruptcy law; i.e., that a right to payment arising post-petition is not subject to discharge. This deduction is consistent with the Supreme Court's conclusion in *Pennsylvania Department of Public Welfare v. Davenport*. Holding that criminal restitution obligations excepted from discharge under section 523(a)(7) fall within the Code's definition of "debt," the Court reasoned that:

> Had Congress believed that restitution obligations were not "debts" giving rise to "claims," it would have had no reason to except such obligations from discharge in § 523(a)(7). . . . [I]t would be anomalous to construe "debt" narrowly so as to exclude criminal restitution orders. Such a narrow construction of "debt" necessarily renders § 523(a)(7)'s codification of the judicial exception for criminal restitution orders mere surplusage. Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.[14]

It is instructive that Congress ultimately negated the outcome of *Davenport* by enacting specific discharge exceptions rather than by narrowing the definition of the

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terms "claim" or "debt." As such, *Davenport* remains controlling as the Supreme Court confirmed in *Johnson v. Home State Bank:*

> Congress subsequently overruled the result in *Davenport* . . . . It did so, however, by expressly withdrawing the Bankruptcy Court's power to discharge restitution orders under 11 U.S.C. § 1328(a), not by restricting the scope of, or otherwise amending, the definition of "claim" under § 101(5). Consequently, we do not view the [change] as disturbing our general conclusions on the breadth of the definition of "claim" under the Code.[15]

Interpreting 11 U.S.C. § 523(a)(16) as this court has done not only confers distinct meaning on the provision but, as a matter of context, is supported by the fact that each discharge exception contained in section 523(a) addresses a debt giving rise to a claim that, absent a specific discharge exception, is dischargeable - for example, debts incurred by fraud, domestic support obligations, educational benefits, etc. This interpretation is further supported by Congress' specificity in sections 523(a) and 1328(a). Section 523(a) excepts the enumerated debts from "discharge

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under section 727, 1141, 1228(a), 1228(b), or 1328(b)."[16] Likewise, paragraph (2) of section 1328(a) excepts any "debt" from discharge "of the kind specified . . . in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a)." If Congress intended to categorically except debts for ongoing association assessments from discharge it would have said so.

C. Chapter 13 Provides for a Broad Discharge.

Allowing for the discharge of the obligations at issue is consistent with the principles underlying a chapter 13 discharge and reflects the execution of Congress' policy that such a discharge should furnish broader relief. Again, the Supreme Court in *Davenport* addressed this stating:

> Congress defined "debt" broadly and took care to except particular debts from discharge where policy considerations so warranted. Accordingly, Congress secured a broader discharge for debtors under Chapter 13 than Chapter 7 by extending to Chapter 13 proceedings some, but not all, of § 523(a)'s exceptions to discharge. See 5 Collier on Bankruptcy ¶ 1328.01 [1][c] (15th ed. 1986) ("[T]he dischargeability of debts in chapter 13 that are not dischargeable in chapter 7 represents a policy judgment that [it] is preferable for debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives") (footnote omitted). . . . Thus, to construe "debt" narrowly in this context would be to override the balance Congress struck in crafting

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> the appropriate discharge exceptions for Chapter 7 and Chapter 13 debtors.[17]

IV. CONCLUSION

The court sustains the objections brought by Bank of America and the Homeowners Association to the plan provision proposing a transfer of title. The court rejects the Homeowners Association's contention that Mr. and Mrs. Coonfield's plan must provide for the payment of ongoing assessments. The debtors may propose a revised plan in accordance with this decision.

So Ordered.

/s/
Frederick P. Corbit
Bankruptcy Judge

///END OF MEMORANDUM DECISION///

Footnotes:

[1.] Section VIII of the debtors' plan contains the following provision:

> All collateral surrendered in paragraph III.A.4.b. [including the condominium] is surrendered in full satisfaction of the underlying claim(s). Pursuant to 1322(b)(8) and (9), title to the property located at 4 Lake Bellevue Drive Unit #209, Bellevue, Washington 98005, shall vest in Bank of America upon confirmation, and the Confirmation Order shall constitute a deed of conveyance of the property when recorded. All secured claims secured by Debtor's property located at 4 Lake Bellevue Drive Unit #209, Bellevue, Washington 98005 will be paid by the surrender of the collateral and foreclosure of the security interests.

[2.] The debtors' budget allows for, and the debtors' plan provides for, the payment of $1,000 per month for thirty-six (36) months. If the debtors are required to pay the current monthly assessment of $525.84, the amount available for distribution to all creditors under the plan would be reduced.

[3.] *See, e.g.*, 17 WILLIAM B. STOEBUCK AND JOHN W. WEAVER, REAL ESTATE: PROPERTY LAW, WASHINGTON PRACTICE SERIES, at 497

(2d. ed. 2004). "Theoretically, a deed is not effective until it is 'accepted' by the grantee."

[4] *See Foster v. Double R Ranch Ass'n (In re Foster)*, 435 B.R. 650 (B.A.P. 9th Cir. 2010). The Homeowners Association argues that the ruling in *Foster* extends to all situations where a debtor retains a "legal, equitable or possessory interest" in a condominium unit. *Id.* at 661. The language relied on by the Homeowners Association and quoted from *Foster* is lifted from paragraph (16) of 11 U.S.C. § 523(a) which specifically excepts debts for ongoing association assessments from discharge under "section 727, 1141, 1228(a), 1228(b), [and] 1328(b)." However, the exception set forth in section 523(a) does not include section 1328(a) - the discharge provision relevant to this case.

[5] Courts have distinguished *Foster* from situations, like this one, where debtors have surrendered the condominium. *See, e.g., In re Colon*, 465 B.R. 657 (Bankr. D. Utah 2011).

[6] *Foster*, 435 B.R. at 661.

[7] See, *e.g., Foster* and *River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833 (4th Cir. 1994).

[8] See, *e.g., In re Rosteck*, 899 F.2d 694 (7th Cir. 1990).

[9] "The 'right to payment' described under § 101(5) does not depend upon a contractual arrangement between the parties." *In re Mattera*, 203 B.R. 565, 571 (Bankr. D. N.J. 1997) (citing *Ohio v. Kovacs*, 469 U.S. 274, 279-281, 105 S. Ct. 705, 708, 83 L.Ed.2d 649 (1985)).

[10] *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558, 110 S. Ct. 2126, 2130, 109 L.Ed.2d 588 (1990), superseded by statute, Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865, as recognized in *Johnson v. Home State Bank*, 501 U.S. 78 (1991) (citing H.R. Rep. No. 95-595, at 309, U.S. Code Cong. & Admin. News 1978, p. 6266 (describing definition of "claim" as "broadest possible" and noting that the Bankruptcy Code "contemplates that all legal obligations of the debtor ... will be able to be dealt with in the bankruptcy case"); *accord* S. Rep. No. 95-989, at 22, U.S. Code Cong. & Admin. News 1978, p. 5808).

[11] *In re Hawk*, 314 B.R. 312, 316 (Bankr. D. N.J. 2004) (quoting *Mattera*, 203 B.R. at 571).

[12] This conclusion would be different if this court was confronted with facts similar to those in *Foster*. Simply because the obligations at issue are dischargeable under section 1328(a), does not lead to debtors receiving a free ride if they continue to benefit from the property. Personal liability for ongoing assessments may arise on theories of unjust enrichment, quantum meruit, or implied contract. See, *e.g., Mattera*, 203 B.R. at 572. Further, this court's holding leaves property interests intact. The Homeowners Association and Bank of America may pursue their *in rem* state law remedies. *See Siegel v. Fed. Home Loan Mortg. Corp.*, 143 F.3d 525, 531 (9th Cir. 1998) (citing *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150, 2153, 115 L.Ed.2d 66 (1991)). Finally, to the extent this court's conclusion differs from *Foster*, the Ninth Circuit Court of Appeals has not determined that the Bankruptcy Appellate Panel's decisions are binding on bankruptcy courts in the circuit as a whole. *See State Comp. Ins. Fund v. Zamora (In re Silverman)*, 616 F.3d 1001, 1005 n. 1 (9th Cir. 2010) (citing *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990)).

[13] Congress has remained faithful to the manner in which claims are determined. While the substance of a claim is determined by state law, "[t]he question of when a debt arises under the bankruptcy code is governed by federal law." *Siegel*, 143 F.3d at 532 (quoting *Cal. Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 929 (9th Cir. 1993)). ("'The determination of when a claim arises for purposes of bankruptcy law should be a matter of federal bankruptcy law . . . .'"); (quoting *Corman v. Morgan (In re Morgan)*, 197 B.R. 892, 896 (N.D. Cal. 1996) (finding that determination of when a claim arises under the bankruptcy code should be governed by federal law), *aff'd*, 131 F.3d 147 (9th Cir. 1997); (quoting *Cohen v. N. Park Parkside Cmty Ass'n (In re Cohen)*, 122 B.R. 755, 757 (Bankr. S.D. Cal. 1991) ("However, federal bankruptcy law, rather than California state law, governs when a debt arises for purposes of determining dischargeability.")

[14] *Davenport*, 495 U.S. at 562.

[15] *Johnson v. Home State Bank*, 501 U.S. 78, 83 n. 4, 111 S.Ct. 2150, 2154, 115 L.Ed.2d 66 (1991). *See also* 2 Collier on Bankruptcy ¶ 101.05[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). "The *Davenport* decision reinforces the statute's intended effect to define the scope of the term 'claim' as broadly as possible . . . . It can be expected that in

light of *Davenport* the courts will rebuff virtually all attempts to characterize obligations as outside the scope of the definition due to 'special' or unique characteristics of those obligations. Although Congress, in two separate acts, (footnote omitted) amended Code section 1328(a) to make certain criminal restitution debts nondischargeable in chapter 13 cases, thus reversing the result in *Davenport*, it did nothing to change the definition of claim or to disturb the Supreme Court's holding regarding the scope of that definition. Therefore, the broad scope of the term "claim" described in *Davenport*, including obligations for criminal restitution, continues to be law."

[16] Cases cited by the Homeowners Association are distinct from this case because the debtors in those cases were not seeking a discharge under section 1328(a). *See In re Rivera*, 256 B.R. 828 (Bankr. M.D. Fla. 2000) (the debtor filed a chapter 7 petition); *In re Burgueno*, 451 B.R. 1 (Bankr. D. Ariz. 2011) (the debtor filed a chapter 11 petition); *In re Ames*, 447 B.R. 680 (Bankr. D. Mass. 2011) (the debtor filed a chapter 7 petition).

[17] *Davenport*, 495 U.S. at 562-63.

In re MADELINE ROSA, Debtor.
Case No. 13-00630
UNITED STATES BANKRUPTCY COURT DISTRICT OF HAWAII
Dated: July 8, 2013

Chapter 13
Re: Docket No. 2
MEMORANDUM OF DECISION ONCHAPTER 13 PLAN CONFIRMATION

The chapter 13 plan in this case provides that title to certain real property shall be vested in the first mortgagee. The standing trustee objects. For the following reasons, I conclude that, because the mortgagee did not object, the plan can be confirmed.

According to her schedules, the debtor jointly owns (along with Eduardo Bringas and RBA Holdings LLC) real property in Ewa Beach that is subject to a first mortgage in favor of "City National Bank/Ocwen Loan Service" and a second mortgage in favor of Franklin Credit Management. The property is apparently subject to homeowners' association fees. The debtor has no equity in the property and both mortgages are seriously delinquent. The debtor's modest income is not sufficient to cover the mortgage payments, let alone to cure the delinquencies.

The debtor has wisely decided to get rid of the property. But this is easier

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said than done. The mortgagor ordinarily cannot compel the mortgagee to foreclose, and the mortgagor cannot convey the property to the mortgagee or anyone else unless the mortgagee/grantee accepts the conveyance.

This poses a serious problem for chapter 13 debtors who own property that is covered by an owners' association, such as a condominium unit, because "as a matter of law, debtor's personal liability for HOA dues continues postpetition as long as he maintains his legal, equitable or possessory interest in the property and is unaffected by his discharge." Foster v. Double L Ranch Assoc. (In re Foster), 435 B.R. 650 (B.A.P. 9th Cir. 2010). (Foster applied Washington state condominium law, but Hawaii law appears to be the same. Further, under section 523(a)(16), the same result applies where the debtor obtains a discharge in chapter 7 or a "hardship" discharge under section 1328(b).)

Ms. Rosa's plan places the first and second mortgage claims in Class 3, which means that she will "surrender" the property to the secured creditors. This treatment is one of the ways in which a chapter 13 plan can deal with a secured claim. 11 U.S.C. § 1325(a)(5)(C). It does not solve the entire problem, however, because surrender does not transfer ownership of the surrendered property. Rather, "surrender" means only that the debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in

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the collateral. Pratt v. General Motors Acceptance Corp. (In re Pratt), 462 F.3d 14,18-19 (1st Cir. 2006); In re Gollnitz, 456 B.R. 733, 736 (Bankr. W.D.N.Y. 2011) ("Authorization for surrender does not consitute a transfer of title. Rather, transfer requires both the surrender of an interest and its acceptance.") Therefore, surrender alone does not cut off the debtor's liability for association fees.

Ms. Rosa's plan also includes the following nonstandard provision:

> All collateral surrendered for Class 3 claims is surrendered in full satisfaction of the underlying claim. Pursuant to §§ 1322(b)(8) and (9), title to the property located at 91-1849 Luahoana Street, Ewa Beach, Hawaii 96707, shall vest in City National Bank/ OCWEN Loan Service upon confirmation, and the Confirmation Order shall constitute a deed of conveyance

> of the property when recorded at the Bureau of Conveyances. All secured claims secured by the Debtor's property in Ewa Beach will be paid by surrender of the collateral and foreclosure of the security interests.

The trustee objects to this provision. The trustee has the duty to appear and be heard at plan confirmation hearings, 11 U.S.C. § 102(b)(2)(B), and he "may object if the plan fails to confirm to all requirements in the Bankruptcy Code," including those that primarily protect secured creditors. Andrews v. Loheit (In re Andrews), 49 F.3d 1404, 1408 (9th Cir. 1995). I rely upon and appreciate his careful review of all provisions of chapter 13 plans.

The trustee correctly points out that surrender does not transfer ownership of the surrendered property. The debtor responds that she is not merely

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surrendering the property; she is also proposing that title be vested in the first mortgagee, and that the Bankruptcy Code specifically authorizes such a provision:

> [T]he plan may . . . provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity . . . .

11 U.S.C. § 1322(b)(9). She also points out that the secured creditors have not objected to the plan.

I agree with the debtor. It is true that "surrender" does not transfer title to the property. But Congress spoke of "vesting," not "surrender," in section 1322(b)(9). Under familiar rules of statutory interpretation, courts presume that, when Congress uses different words, it means different things. The plain meaning of "vesting" includes a present transfer of ownership. Thus, section 1322(b)(9) permits inclusion of this nonstandard provision.

The next question is whether the plan can be confirmed with the nonstandard provision. Section 1325(b) states the confirmation requirements applicable to secured claims. The court can confirm a plan only if (1) the secured creditor "accepts" the plan, 11 U.S.C. § 1325(a)(5)(A); (2) the debtor's payments to the creditor comply with certain standards and the creditor retains its lien, id. § 1325(a)(5)(B); or (3) the debtor "surrenders the property securing such claim to such holder," id. § 1325(a)(5)(C). These requirements are stated in the

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disjunctive, so the plan need only satisfy one of the three tests.

The second permitted treatment - sometimes called "cramdown" - does not apply to this plan. The third standard - surrender - does not fully validate this plan, because the debtor proposes vesting in addition to surrender. Therefore, the plan is confirmable only if the first standard - acceptance - is met.

The Bankruptcy Code does not define "accepts" for purposes of chapter 13. The Ninth Circuit and the overwhelming majority of courts hold that a secured creditor's failure to object to a chapter 13 plan constitutes acceptance. See Andrews v. Loheit (In re Andrews), 49 F.3d 1404, 1409 (9th Cir. 1995) ("Here, § 1325(a)(5) is fulfilled because subsection (A) was satisfied when the holders of the secured claims failed to object. In most instances, failure to object translates into acceptance of the plan by the secured creditor."); In re Szostek, 886 F.2d 1405, 1413 (3d Cir. 1989) ("The general rule is that the acceptance of the plan by a secured creditor can be inferred by the absence of a timely objection."); In re James, 260 B.R. 498, 503 (Bankr. D. Idaho 2001) ("The case law makes clear that if the holder of an allowed secured claim provided for by a plan fails to object to confirmation of the plan, Section 1325(a)(5)(A) is satisfied. . . . [N]o objection has

been received from the holders of any allowed secured claims, and therefore Section 1325(a)(5)(A) has been satisfied.")

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It is reasonable to infer acceptance from the lack of an objection only if the creditor has received adequate notice of the plan. The clerk must give notice "by mail" to all creditors and other parties of "the time fixed . . . for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan." Fed. R. Bankr. P. 2002(b). The notice "shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case," or, if the creditor has not filed such a request, to "the address shown on the list of creditors or schedule of liabilities, whichever is filed later." Id. 2002(g).

Sections 342(c)(2) and (f) contain rules about creditors' addresses, but those provisions are inapplicable. Those sections apply "[i]f notice is required to be given by the debtor to a creditor under this title." Section 1324 provides that the confirmation hearing is to be held "after notice," but does not specify who must give notice. No provision of the Bankruptcy Code requires the debtor to give notice of the confirmation hearing; indeed, the applicable rule requires the clerk to give the notice. Therefore, section 342's address rules do not apply.

Similarly, rule 7004 does not apply. In a "contested matter," Fed. R. Bankr. P. 9014 requires service of the motion pursuant to rule 7004. That rule contains additional requirements, including special rules for service on an insured depository institution. The filing of a plan does not, however, initiate a contested

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matter. Plan confirmation becomes a contested matter only when an objection is filed. 10 Collier on Bankruptcy ¶ 9014.02 (16th rev. ed. 2012). Thus, rule 7004 does not govern service of chapter 13 plans.

In this case, the clerk (using the Bankruptcy Noticing Center) sent the required notice to "City Ntl Bank/Ocwen Loan Service" at the address provided by the debtor. This was correct because the creditor has not filed a request for notice or a proof of claim. Therefore, the named creditor got proper notice of the plan, and its failure to object means that it has accepted the plan.

There may be cases in which the mortgagee would be happy with a proposal like Ms. Rosa's; the vesting provision may avoid the expense and delay of a foreclosure proceeding. In other cases, the mortgagee may have legitimate reasons to object. The property might be a liability rather than an asset if it is, for example, contaminated with hazardous waste or subject to exorbitant association fees. Further, if the property is subject to other liens or co-ownership interests, the mortgagee might have to foreclose even with the vesting provision, and vesting plus the doctrine of merger might extinguish the mortgage.

I would not have been surprised if the first mortgagee had objected to Ms. Rosa's plan. There is a second mortgage and nonbankrupt co-owners, so the vesting provision probably will not obviate a foreclosure. The homeowners

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association will probably take the position that, as owner of the property, the first mortgagee will be liable for the association fees upon confirmation of the plan. But the fact remains that the first mortgagee received adequate notice (as far as the record reveals) and did not object. I will not attempt to read the lender's mind and assume that it dislikes the plan, even though its conduct is to the contrary. (I express no opinion on what might happen if the first mortgagee were to file a motion to set aside the confirmation of the plan because the debtor provided the wrong name or address for the creditor.)

For these reasons, the plan is CONFIRMED. Ms. Rosa's counsel shall submit an appropriate separate order.

Robert J. Faris
United States Bankruptcy Judge