

In re Rubottom

Case No. 391-31383-H13 BAP # OR 91-1612-AsVO 12-31-91
Reversing Bankruptcy Court (HLH)

The BAP reversed the bankruptcy court's oral ruling confirming the debtor's plan. The bankruptcy court held that a debtor's plan could properly propose to pay an oversecured creditor, whose only collateral is a security interest in the debtor's principal residence, after the maturity date of the loan notwithstanding §1322(b)(2). The bankruptcy court held that the US District Court for Oregon properly held in In re Vanasen that a debtor could withhold payments for a short period of time on such a loan while the debtor attempts to sell the property to recover a significant equity in the property without violating §1322(b)(2)'s ban on "modification" since such a delay did not amount to a modification.

By analogy to Vanasen, the bankruptcy court ruled that, notwithstanding In re Seidel which prohibits extending the maturity date on such a loan, the debtor could be granted a short period of time to sell property and pay the creditor in full even after the maturity date of the loan. In Seidel, the debtor proposed to reamortize the loan over an extended period and make monthly payments while the debtor in this case proposed a brief extension of the maturity date in order to sell the property and pay the creditor in full.

The BAP reversed and held that the Code and Seidel do not allow any extension of the maturity date in such a loan. The BAP pointed out that Vanasen was distinguishable on the ground the loan in Vanasen had not yet matured.

ORDERED PUBLICISED

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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DEC 31 1992

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re)	BAP No. OR 91-1612-AsVO
GARY T. RUBOTTOM and)	BK. No. 391-31383-H13
JUNE L. RUBOTTOM,)	
)	
Debtor(s).)	
_____)	
METROPOLITAN MORTGAGE &)	
SECURITIES CO., INC.,)	
)	
Appellant(s),)	
)	
v.)	<u>O P I N I O N</u>
GARY T. RUBOTTOM AND JUNE L.)	
RUBOTTOM, ROBERT W. MEYERS,)	
Trustee, UNITED STATES TRUSTEE,)	
)	
Appellee(s).)	
_____)	

Argued and Submitted on
November 21, 1991 at Portland, Oregon

Filed - DEC 31 1991

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Henry L. Hess, Jr., Bankruptcy Judge, Presiding

Before: ASHLAND, VOLINN, and OLLASON, Bankruptcy Judges.

P92-2 (10)

1 ASHLAND, Bankruptcy Judge:

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3 Metropolitan Mortgage & Securities Co., Inc. appeals from the
4 bankruptcy court's order confirming the Rubottoms' Chapter 13 plan.
5 The plan contained a provision extending the payment period on a
6 note that matured during the plan period. We reverse because the
7 provision in the plan violated § 1322(b)(2) of the Code.

8

STATEMENT OF THE FACTS

9 Metropolitan holds a third deed of trust on the Rubottoms'
10 residence. The deed of trust is Metropolitan's only security for
11 the Rubottoms' promissory note. The original principal of the note
12 was \$38,000. Metropolitan advanced an additional \$34,035 for the
13 Rubottoms to cure defaults on senior secured debt. These advances
14 were added to the debt and became secured by the Rubottoms'
15 residence pursuant to paragraph five of the deed of trust.
16 According to the terms of the note and deed of trust all unpaid
17 amounts became due and payable from debtors on July 18, 1991.

18 The plan excused the Rubottoms from paying the note when it
19 matured on July 18, 1991. The plan gave the Rubottoms until
20 December 31, 1992 or until the property was sold (whichever came
21 first) to pay the matured note. Upon sale, the Rubottoms were to
22 pay Metropolitan all unpaid amounts accrued up until the time of
23 the sale. If the house remained unsold on December 31, 1992, the
24 secured creditors would be granted relief from stay to foreclose.

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STATEMENT OF THE PROCEEDINGS

The Rubottoms filed their Chapter 13 petition and proposed plan on March 1, 1991. At the plan confirmation hearing, the bankruptcy court initially held that a Chapter 13 plan could not extend the maturity date of the note. The court cited In re Ivory, 32 B.R. 788 (Bankr. D.Or. 1983) for this proposition.

The Rubottoms argued that the plan did not extend the maturity date of the note because it proposed to pay off the note from sale proceeds of the house by December 31, 1992. The bankruptcy court changed its thinking on the issue and agreed with the Rubottoms. The court held that a Chapter 13 plan need not provide for payment of a matured note if the debtor is attempting to sell the property that secures the note. The court stated that it was relying on In re Vanasen, 81 B.R. 59 (D.Or. 1987), for this proposition. On this basis, the bankruptcy court overruled Metropolitan's objection and confirmed the Rubottoms' Chapter 13 plan.

STATEMENT OF THE ISSUES

This appeal poses three issues. The Rubottoms interpose a threshold issue in support of the lower court's holding: whether the § 1322(b)(2) prohibition against modification of a home mortgage lender's rights applies to a junior lienholder.

Next, whether the bankruptcy court erred in confirming a Chapter 13 plan that did not provide for payment on a note that matured before the end of the plan period, where the note holder is secured only by a security interest in the debtor's principal residence.

1 Finally, whether, because the plan provides for a sale of the
2 property, this case falls within the exception to § 1322(b)(2)
3 provided for in In re Vanasen.

4 STANDARDS OF REVIEW

5 This panel reviews questions of law de novo. In re Comer, 723
6 F.2d 737, 739 (9th Cir. 1984). Whether § 1322(b)(2) applies to
7 short term mortgages is a question of law requiring statutory
8 interpretation. Statutory interpretation is reviewed de novo. In
9 re Benny, 812 F.2d 1133, 1140 (9th Cir. 1987). Whether an already
10 matured debt on a home mortgage may be modified by a Chapter 13
11 plan is a question of law subject to de novo review. In re Seidel,
12 752 F.2d 1382, 1383 (9th Cir. 1985).

13 Whether certain case law applies to the undisputed facts of
14 this case is a question of law subject to de novo review.

15 DISCUSSION

16 **Section 1322(b)(2) applies to junior deeds of trust.**

17 Under § 1322(b) of the Bankruptcy Code, a Chapter 13 Plan
18 may --

19 (2) modify the rights of holders of secured
20 claims, other than a claim secured only by a
21 security interest in real property that is the
debtor's principal residence, or of holders of
unsecured claims ...;

22 11 U.S.C. § 1322(b)(1988).

23 The Rubottoms contend that this case presents a question of
24 first impression in the Ninth Circuit: whether a junior lien
25 holder, secured only by a lien against a debtor's principal
26 residence, is protected by § 1322(b)(2). The Rubottoms argue that

1 the Ninth Circuit in In re Hougland, 886 F.2d 1182, 1184 (9th Cir.
2 1989), casts doubt as to whether § 1322(b)(2) applies to junior
3 home mortgagees.

4 These statements are incorrect. This case does not present a
5 question of first impression, nor does Hougland cast doubt upon the
6 applicability of § 1322(b)(2) to junior home mortgagees. The Ninth
7 Circuit in Hougland said the following:

8 Another exception [to the § 1322(b)(2) prohibition
9 against modification of rights of home loan
10 mortgagees] may be found when persons who are not
11 true residential real estate lenders secure their
12 loans by taking a security interest in a debtor's
13 home so that they can take advantage of the Chapter
14 13 provisions. See the discussion in In re Shaffer,
15 84 B.R. 63 (Bankr. W.D. Va. 1988). We need not and
16 do not decide whether section 1322(b)(2) covers
17 those lenders at all....

18 Hougland 886 F.2d at 1184 (emphasis added). The Hougland court
19 took no position on the issue in this case except to acknowledge
20 the stance of the Shaffer case.

21 The applicability of § 1322(b)(2) to junior home mortgagees
22 was decided in In re Harlan, 783 F.2d 839 (9th Cir. 1986). The
23 Rubottoms argue in their brief that although Harlan involved the
24 same issue as this case, the relevant language in Harlan was dicta.
25 The Rubottoms argue that the debtor in Harlan "did not challenge
26 the entitlement of the junior lien holder to the benefits of
Section 1322(b)(2) and the decision is completely silent upon this
issue."

Harlan involved a debtor, Charlene Harlan, who filed a
petition for Chapter 13 relief in February 1983. Harlan's petition

1 listed \$59,000 owed to a creditor with a first deed of trust and
2 \$30,000 owed to Pan American Mortgage Company secured by a second
3 deed of trust. Harlan's home secured both deeds of trust. Western
4 Equities was the trustee under Pan American's deed of trust.
5 Harlan's Chapter 13 plan provided for 60 monthly payments of \$166,
6 but did not mention the balloon payment on the Pan American note.

7 The \$30,000 balloon payment on the Pan American note became
8 due on August 10, 1983, after the plan was confirmed. Harlan did
9 not make the balloon payment. Western Equities brought a relief
10 from stay motion. The bankruptcy court denied the motion because a
11 plan had been duly confirmed and Western Equities was bound by the
12 plan's provisions under § 1327(a) of the Code. The district court
13 affirmed the bankruptcy court's holding.

14 The Ninth Circuit reversed, noting that the confirmed plan had
15 not mentioned the balloon payment and that absent the creditor's
16 consent, a plan could not modify the terms of the promissory note.
17 Harlan, 783 at 840.

18 **The Rubottoms' plan was not confirmable because modifying**
19 **the terms of Metropolitan's claim violated § 1322(b)(2)**
of the Code.

20 The Rubottoms admit that if Metropolitan prevails on the issue
21 of whether 1322(b)(2) applies to junior home mortgagees, then the
22 decision of the bankruptcy court confirming the Rubottoms'
23 Chapter 13 plan should be reversed. We agree.

24 In re Seidel stated the following rule:

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1 When a creditor is secured only by the debtor's
2 principal residence, a Chapter 13 plan is barred
3 from "modifying" the rights of the secured creditor.
4 11 U.S.C. § 1322(b)(2). Seidel's plan proposes to
5 pay off a note, which had already reached its due
6 date before he filed for bankruptcy, in installments
7 over the next five years with a balloon payment at
8 the end of that period. His plan therefore affects
9 the rights of the creditor who holds both the note
10 and the security interest in Seidel's home mortgage.
11 We must decide whether the plan will so affect the
12 creditor's rights that it amounts to "modifying"
13 them, in violation of § 1322(b)(2).

14 In deciding whether a plan rises to the level of
15 "modifying" rights we first consider whether that
16 plan merely "cures" a default. Section 1322(b)(3)
17 authorizes "the curing or waiving of any default,"
18 while section 1322(b)(5) authorizes the curing of a
19 default when "the last payment is due after the date
20 on which the final payment under the plan is due."
21 We hold that Seidel's plan "modifies" his creditor's
22 rights in violation of subsection b(2) and that the
23 "cure" provisions of subsections b(3) and b(5) are
24 inapplicable when a debt has reached its maturity
25 date in the absence of acceleration, prior to the
26 filing of the Chapter 13 petition.

Seidel, 752 F.2d at 1383.

 In Seidel the court held that debtors cannot use Chapter 13 to
delay payment of an unaccelerated debt that matures before the
filing of the petition. Seidel, 752 F.2d at 1383. Harlan made the
rule in Seidel applicable to debts that mature before the end of
the plan period. Harlan, 783 F.2d at 840-41. See also In re
Gavia, 24 B.R. 573, 574-75 (9th Cir. BAP 1982).

 Here, the Rubottoms' promissory note matured after plan
confirmation. The plan did not provide for the payment of
principal, interest, late charges, and fees that became due on July
18, 1991. The Rubottoms have not paid the amount owed and are
"postponing payment of the debt beyond the time originally

1 contemplated by the parties to the contract." Seidel, 752 F.2d at
2 1384. The plan therefore violated § 1322(b)(2) because it
3 unilaterally modified the debt contract.

4 At oral argument, the Rubottoms' counsel argued that this case
5 involved a plan that cured a default of an accelerated note.
6 Apparently, it was the first time that this factual assertion was
7 made in this proceeding. The Rubottoms did not contradict
8 Metropolitan's assertion that § 1322(b)(2), as it relates to this
9 case, prohibits extension of the payment term beyond the maturity
10 date. Also, the Rubottoms' brief stated that the applicability of
11 § 1322(b)(2) to junior home mortgagees was the only issue in this
12 appeal. We find no support for the assertion made at oral argument
13 by the Rubottoms' counsel.

14 Also, whether the Rubottoms' plan could permissibly cure the
15 alleged acceleration is irrelevant because the Rubottoms have
16 received the benefit of a cure due to the passage of time. A
17 ruling for either party would not provide either side with a
18 meaningful remedy. The relevant issue in this case is whether a
19 cure beyond the date on which the note matured is permissible.

20 **The proposed sale of the Rubottoms' residence does not**
21 **exempt the plan from § 1322(b)(2)'s prohibition against**
22 **modification of a home mortgage lender's rights.**

23 At the confirmation hearing, the bankruptcy court found that
24 the Rubottoms' plan did not modify Metropolitan's rights because
25 the Rubottoms would attempt to sell their residence by December 31,
26 1992. The court relied on In re Vanasen, 81 B.R. 59 (D.Or. 1987).

In Vanasen the lender sought relief from stay because the

1 debtors did not make payments under the terms of a mortgage note.
2 The court denied post-confirmation relief from stay and permitted
3 the debtors until the end of the plan to sell their house and pay
4 the lender. Vanasen 81 B.R. at 62.

5 The facts in Vanasen fell within the language of § 1322(b)(5),
6 which provides an exception to subsection (b)(2) when the note
7 matures after the plan ends. This was clear from the holding in
8 Vanasen:

9 Here, unlike the Ninth Circuit cases [Seidel and
10 Harlan], the obligations mature after the plan ends.

11

12 Read together sections 1322(b)(2) and (5) provide
13 that the plan may provide "for the curing of any
14 default" as long as it does not modify the rights of
15 a creditor's claim secured solely by the debtor's
16 principal residence. . . . Allowing the debtors a
17 reasonable time to sell the property and pay the
18 debt does not "so affect" the Bank's rights as to
19 violate section 1322(b)(2). (Citation omitted.)
20 The Bank is merely faced with a delay. That delay
21 does not impermissibly extend the notes beyond their
22 maturity date nor does it jeopardize the Bank's
23 security interest.

24 Vanasen, 81 B.R. at 61, 62.

25 This case is distinguishable from Vanasen, which involved the
26 permissible curing of a default under § 1322(b)(5). This case
involves the impermissible modification of a right to payment on a
note that matured during the plan period. Also, in Vanasen it was
the date of maturity of the note that brought the plan within the
§ 1322(b)(5) exception, and not the prospect of a sale. Here, the
note matures before the end of the plan period. Therefore neither
the Vanasen nor the § 1322(b)(5) exception to the § 1322(b)(2)

1 prohibition against the modification of a home mortgagee's rights
2 is applicable to this case.

3 CONCLUSION

4 In view of Ninth Circuit precedents, the bankruptcy court
5 erred in confirming the Rubottoms' plan that extended the time to
6 pay a note that matured during the plan period. We reverse the
7 order confirming the Rubottoms' Chapter 13 plan because the plan
8 violated § 1322(b)(2) of the Code.

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