

Failure to Redeem or Reaffirm
BAPCPA change to "Ride Through"
Subject matter jurisdiction

Kiefer v. Northwest Comm. Credit Union, Adversary No. 09-6105-fra
Joseph R. Kiefer, II, Case No. 09-60949-fra7

8/17/09

FRA

Unpublished

In his Statement of Intention, Debtor indicated that he intended to retain his motor vehicle, but rather than specify redemption or reaffirmation, he indicated that he would "retain, keep current." Debtor's discharge was entered and the case closed. Prior to closure of the case, the Debtor filed this adversary proceeding, seeking a declaratory judgment that Defendant (the party which financed the loan to purchase the vehicle), by continuing to accept payments from Debtor, had waived its contractual right to self-help repossession respecting the motor vehicle. Defendant filed a motion to dismiss on the grounds that the bankruptcy court lacked jurisdiction to hear the matter.

Interpreting the changes made by the 2005 Bankruptcy Reform Act, the court found that by failing to indicate redemption or reaffirmation, the motor vehicle ceased to be property of the estate and the automatic stay was lifted with regard to the motor vehicle.

Citing Dumont v. Ford Motor Credit Co., 383 B.R. 481 (9th Cir. BAP 2008) (since affirmed by the Court of Appeals on September 15, 2009), the Court granted Defendant's motion to dismiss on the grounds that it lacked subject matter jurisdiction over the motor vehicle, which was no longer property of the estate. Debtor's rights with respect to the motor vehicle are defined solely by nonbankruptcy law and the contract between Debtor and Defendant.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case
)	No. 09-60949-fra7
JOSEPH R. KIEFER II,)	
)	
Debtor.)	
-----)	
JOSEPH R. KIEFER II,)	Adversary Proceeding
)	No. 09-6105-fra
)	
Plaintiff,)	
vs.)	
)	
NORTHWEST COMMUNITY CREDIT UNION,)	MEMORANDUM OPINION
)	
Defendant.)	
-----)	

Plaintiff/Debtor filed this adversary proceeding seeking a declaratory judgment that Defendant, by continuing to accept payments, has waived its right to declare Plaintiff in default of a retail instalment contract for the purchase of a motor vehicle, thus depriving Defendant of the right to self-help repossession. Defendant filed a motion to dismiss. As neither party asked for a hearing on Defendant's motion, and the Court finding that a hearing is unnecessary, the matter will be decided on the record and for Defendant.

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1 BACKGROUND

2 Plaintiff filed a chapter 7 bankruptcy case on March 10, 2009.
3 On the Statement of Intention, Debtor listed the secured debt to the
4 Defendant, indicated that he intended to retain the vehicle, and in
5 retaining the vehicle he checked the box "Other," with the explanation
6 that he intended to "retain, keep current." The boxes for "Redeem the
7 property" and "Reaffirm the debt" were left blank.

8 On June 26, 2009, an order discharging debts was entered. The
9 Trustee on July 21, 2009 filed a statement indicating that there were no
10 non-exempt assets in the estate for distribution to creditors and an
11 order was entered on July 22, 2009 approving the trustee's account,
12 discharging the trustee, and closing the estate. Prior to the closing of
13 the estate, Plaintiff filed this adversary proceeding. Defendant has not
14 yet repossessed the motor vehicle constituting its collateral, but the
15 Complaint appears to indicate that Defendant has declared a default and
16 accelerated the amount due.

17 DISCUSSION

18 A. Effect of Failure to Redeem or Reaffirm

19 Prior to the 2005 Bankruptcy Reform Act (BAPCPA)¹, a debtor who
20 was current on a purchase money secured loan could, at least in the Ninth
21 Circuit, maintain possession of the collateral and continue to make
22 payments on the debt without the need for redemption of the property or
23 reaffirmation of the debt. BAPCPA made several changes to the Bankruptcy
24 Code which effectively abrogated the "ride through" as an option

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26 ¹Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

1 available to a debtor on filing. See Dumont v. Ford Motor Credit Co.,
2 383 B.R. 481 (9th Cir. BAP 2008).

3 To summarize the changes made by BAPCPA, as applicable to the
4 present situation²: (1) A debtor must timely file a Statement of
5 Intention and must indicate on that form whether the debtor will
6 surrender the collateral or, if the intent is to maintain possession, to
7 redeem the collateral or enter into a reaffirmation agreement; (2) if the
8 intent is to redeem the collateral or enter into a reaffirmation
9 agreement, the required action must occur within 45 days of the meeting
10 of creditors under Code § 341(a). Failure to take the required actions
11 causes the following to occur: (1) the automatic stay is terminated, (2)
12 the property is no longer property of the estate, and (3) the creditor
13 may take whatever actions respecting the property as are allowed under
14 nonbankruptcy law, including the use of a contractual provision providing
15 for default upon the filing of bankruptcy, commonly known as an ipso
16 facto clause.

17 The Plaintiff indicated on his Statement of Intention that he
18 intended to retain the collateral, but did not state an intention to
19 redeem the property or reaffirm the debt. The effect of the Debtor's
20 action (or nonaction) was to eliminate the vehicle constituting the
21 Defendant's collateral from the property of the estate and to terminate
22 the automatic stay of 11 U.S.C. § 362(a) with respect to the motor
23 vehicle. Defendant was then entitled to exercise its rights under
24 nonbankruptcy law regarding its collateral.

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26 ²The changes can be found at 11 U.S.C. §§ 521(a)(6), 362(h), and 521(d).

1 B. Motion to Dismiss

2 Defendant seeks an order of dismissal on the grounds that this
3 court is without subject matter jurisdiction. District court jurisdiction
4 over title 11 cases is granted by 28 U.S.C. § 1334 and Bankruptcy Court
5 jurisdiction is found at 28 U.S.C. § 157(a), which permits a district
6 court to refer its jurisdiction over bankruptcy cases. Jurisdiction is
7 conferred for "all civil proceedings arising under title 11, or arising
8 in or related to a case under title 11." 28 U.S.C. § 1334(b).

9 Jurisdiction does not "arise under" title 11 in this matter
10 because the cause of action is not "created or determined by a statutory
11 provision of Title 11." McDowell Welding & Pipefitting, Inc. v. U.S.
12 Gypsum Co., 285 B.R. 460, 471 (D.Or. 2002) (internal citations omitted).
13 Rather, the matter is determined solely on the basis of state contract
14 law. Nor does the claim "arise in" title 11, as such proceedings are
15 limited to "those administrative matters that are not based on any right
16 expressly created by title 11, but, nevertheless, would have no existence
17 outside of the bankruptcy." Id. Plaintiff's claims involve state law
18 issues that exist outside of bankruptcy and do not involve administration
19 of the bankruptcy estate.

20 "In the Ninth Circuit the test to determine whether a civil
21 proceeding is 'related to' a bankruptcy case 'is whether the outcome of
22 the proceeding could conceivably have any effect on the estate being
23 administered in bankruptcy'." Dumont, 383 B.R. at 490. A discharge order
24 has been entered and this bankruptcy case has been closed. Any action the
25 Defendant has taken or may take with regard to its collateral will have
26 been taken after the vehicle ceased to be property of the estate. No

1 action taken by the parties in this adversary proceeding will have any
2 effect on the bankruptcy estate. The parties rights and remedies are now
3 defined by the contract between them and by state law. The Court
4 therefore concludes that it does not have jurisdiction to determine
5 matters relating to the subject matter of this adversary proceeding. See
6 Dumont at 490 (bankruptcy court lacked subject matter jurisdiction to
7 determine whether repossession was valid under state law where property
8 was no longer property of the estate).

9 Even if the Court could find that it has subject matter
10 jurisdiction, it would voluntarily abstain under 28 U.S.C. § 1334(c)
11 given the prominence of state law to the issues presented and the lack of
12 federal law issues.

13 CONCLUSION

14 For the reasons given, Defendant's motion to dismiss will be
15 granted on the grounds that the Bankruptcy Court lacks subject matter
16 jurisdiction over the issues presented. Counsel for Defendant should
17 prepare and file an order consistent with this Memorandum Opinion.

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21 FRANK R. ALLEY, III
22 Bankruptcy Judge
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