discharge injunction
chapter 13
mortgage default
11 U.S.C. § 524
11 U.S.C. § 1322(b)(5)
11 U.S.C. § 1322(b)(2)
11 U.S.C. § 1328

In re Kent, Case No. 09-35124

1/22/16 tmb Pub. (2016 WL ?)

When Debtors filed their chapter 13 petition, they were current on a first-lien mortgage held by BAC Home Loans. Debtors confirmed a plan that provided for ongoing mortgage payments directly from the Debtors to BAC.

Debtors completed their plan and obtained a discharge in 2014. They reopened the case to bring this contempt motion against Rushmore Loan Management Services (BAC's successor in interest). Although Debtors conceded that Rushmore's lien remained in place, they argued that their personal liability had been discharged, and that that Rushmore had taken various collection actions that violated the discharge injunction.

Rushmore advanced two alternate theories for why the Debtors' personal liability had not been discharged. First, Rushmore argued that the mortgage had not been "provided for" in the plan, and thus was not included within the scope of § 1328's discharge provision. After analyzing the plain language of § 1328 and relevant case law, the court concluded that the mortgage had been included in the Debtors' plan.

Second, Rushmore asserted that the mortgage had been provided for under § 1322(b)(5), and was therefore exempt from discharge under § 1328(a)(1). The court disagreed with Rushmore's interpretation of § 1322(b)(5), holding that the provision applies only when a debtor uses the plan to cure a default.

Finally, the court considered the impact of the antimodification provision in § 1322(b)(2). Holding that the discharge of personal liability was the result of the Code, not a provision in the plan itself, the court concluded that § 1322(b)(2) was not a bar to discharging the Debtors' liability.

Below is an Opinion of the Court.

Trish M Brown

TRISH M. BROWN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	Bankruptcy Case No. 09-35124-tmb13
MARK CLIFFORD KENT, and SHARON JANELLE KENT,	OPINION
Debtors.	

This matter came before the court on the Motion to Dismiss Motion for Order of Contempt (the "Motion to Dismiss," ECF No. 84) filed by Rushmore Loan Management Services, LLC ("Rushmore"). In the Motion to Dismiss, Rushmore seeks dismissal of the Motion for Order of Contempt (the "Contempt Motion," ECF No. 73) filed by debtors Sharon and Mark Kent ("Debtors"). The Contempt Motion alleges that Rushmore violated the discharge injunction of § 524(a)(2)[1] by attempting to collect a prepetition debt from Debtors and by improperly reporting such debt to credit reporting agencies. In its Motion to Dismiss, Rushmore asserts that Debtors' personal liability for the debt at issue was not discharged in bankruptcy, and thus Debtors have failed to state a claim for relief.

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[1] Unless otherwise noted, all statutory references are to the Bankruptcy Code, title 11, United States Code.

FACTS

The material facts of this matter are not in dispute. Debtors filed a chapter 13 petition on June 30, 2009. ECF No. 1 (petition). Rushmore's predecessor-in-interest, BAC Home Loans Servicing, LP ("BAC"), held[2] a pre-petition claim (the "Mortgage") secured by a first-priority lien on Debtors' primary residence. On September 23, 2009, BAC filed an amended proof of claim setting forth the balance owing on the Mortgage and stating that there was no prepetition arrearage. Claim No. 12-2.

Debtors confirmed a chapter 13 plan (the "Plan," ECF No. 2) on October 19, 2009. ECF No. 26 (order confirming plan). Paragraph 4 of the Plan provides, in relevant part, as follows:

> The debtor shall pay directly to each of the following creditors, whose debts are either fully secured or are secured only by a security interest in real property that is the debtor's principal residence, the regular payment due postpetition on these claims in accordance with the terms of their respective contracts....

The Mortgage was one of several debts listed under paragraph 4 of the Plan. In light of BAC's amended proof of claim (which specified that there was no prepetition arrearage), the Plan did not provide for the curing of any arrearage in connection with the Mortgage.

Debtors received a discharge on September 5, 2014. ECF No. 65. Notice of the discharge was sent to BAC. ECF No. 67. Sometime after the discharge order was entered, BAC transferred the Mortgage to Rushmore. *See* Declaration of Theodore J. Piteo (ECF No. 73), Exhs. F and H. Debtors allege that Rushmore has engaged in various activities to enforce the Debtors' personal liability on the Mortgage, including adverse reporting to credit reporting agencies. Contempt Motion at 3-5.

JURISDICTION

I have jurisdiction to decide the Motion to Dismiss under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (I), and (O).

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[2] The true holder of the claim appears to be the unnamed successor-in-interest to Countrywide Bank, FSB. BAC purported to act as servicer for the holder and Debtors do not dispute that BAC was entitled to file a proof of claim and otherwise act on the creditor's behalf.

ANALYSIS

I. Legal Standard

Rushmore moves for dismissal of the Contempt Motion under Federal Rule of Civil Procedure 12(b)(6), which Rushmore contends is applicable through Federal Rule of Bankruptcy Procedure 7012. In fact, Rule 7012 does not apply to a contested matter such as this. *See* Fed. R. Bankr. P. 9014(c). Accordingly, I have construed the Motion to Dismiss as a motion for summary judgment under Federal Rule of Civil Procedure 56 (applicable through Federal Rules of Bankruptcy Procedure 7056 and 9014(c)).

A court should grant summary judgment on a claim "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the facts and draw all inferences in the light most favorable to the non-moving party. *Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036, 1040 (9th Cir. 2003). The primary inquiry is whether the evidence presents a sufficient disagreement to require a trial, or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). A party opposing a properly supported motion for summary judgment must present affirmative evidence of a disputed material fact from which a finder of fact might return a verdict in its favor. *Id.* at 257.

II. Issues Presented

As previously mentioned, the material facts are not in dispute. At oral argument, Debtors agreed that the discharge does not impair Rushmore's lien on the real property. Thus, the only disputed legal question at this phase in the proceedings is whether Debtors' personal liability on the Mortgage was discharged.[3]

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[3] Rushmore also argues that even if their personal liability was discharged, Debtors have not alleged actions that would constitute a violation of the discharge injunction; and further, that Debtors are not entitled to damages. Motion to Dismiss at 8-10. Debtors have offered evidence of collection activities by Rushmore. Piteo Decl., Exhs. D, E, and F. Consistent with the requirements of Federal Rule of Civil Procedure 56, I will construe these allegations in the light most favorable to Debtors, and for purposes of the present motion (continued...)

A. Was the Mortgage Included in the Debtors' Discharge?

Discharges in chapter 13 cases are governed by § 1328. A discharge order discharges "all debts provided for by the plan or disallowed under section 502" *except* those debts described in §§ 1328(a) and (d). 11 U.S.C. § 1328(a). Rushmore presents two alternative arguments: either the Mortgage was not provided for in the plan, and therefore was not subject to § 1328's discharge; or, it was provided for under § 1322(b)(5), and therefore is expressly excepted from discharge under § 1328(a)(1). I address these arguments in turn.

1. Was the Mortgage Provided for in the Plan?

The Bankruptcy Code allows for a discharge of debts provided for in a plan, but it does not define the term "provided for." Rushmore argues that if a claim is "left unaffected" by a plan, then it is not discharged. Motion to Dismiss at 8. This argument is not persuasive because it seeks to substitute the concept of "leaving unaffected" for the actual statutory language, which speaks only of debts that are "provided for" in a plan. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

When construing a statutory phrase that includes an undefined term, courts are to "construe that term according to its ordinary, contemporary, common meaning." *Ransom v. MBNA Am. Bank, N.A. (In re Ransom)*, 380 B.R. 799, 807 (9th Cir. BAP 2007). The Supreme Court has noted that the "most natural reading of the phrase to 'provid[e] for by the plan' is to 'make a provision for' or 'stipulate to' something in a plan." *Rake v. Wade*, 508 U.S. 464, 473 (1993) (alteration by the Court). In the specific context of § 1328(a), the Court noted that the phrase "provide for" "is commonly understood to mean that a plan 'makes a provision' for, 'deals with,' or even 'refers to' a claim." *Id.* at 474.

The Ninth Circuit takes a similar approach in *Lawrence Tractor Company v. Gregory (In re*

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[3](...continued)
I will assume, without deciding, that Rushmore's actions would violate the discharge injunction if Debtors' liability has in fact been discharged.

Gregory), 705 F.2d 1118 (9th Cir. 1983). In *Lawrence*, the court held that "the phrase 'provided for' in section 1328(a) simply requires that for a claim to become dischargeable the plan must 'make a provision for' it, *i.e.,* deal with it or refer to it." *Id.* at 1122. The creditor in *Lawrence* argued that its unsecured claim had not been provided for because the debtor's plan paid general unsecured creditors nothing. In rejecting this argument, the Court of Appeals noted that "there is a significant difference between a plan which does not acknowledge an unsecured claim and a plan which proposes to pay nothing on a claim. In the former case, the unsecured creditor has no ability to object, in a meaningful way, to confirmation of the debtor's plan." *Id.* (quoting *Lawrence Tractor Co. v. Gregory (In re Gregory)*, 19 B.R. 668, 670 (9th Cir. BAP 1982) (internal quotation marks omitted)). The present case is different, of course, because it involves a secured claim; yet, the core holding of *Gregory* is still instructional: when a plan says "creditor will receive nothing," that creditor's claim is "provided for." Here, Debtor's Plan essentially says mortgage creditor will receive what it is entitled to under applicable nonbankruptcy law, and will receive it directly from the Debtor. Even though payment is not made through the trustee, this provision is still procedurally and legally meaningful: parties interested in the confirmation process are notified that a certain portion of a debtor's income will go to servicing direct-pay claims, the holder of a direct-pay claim is notified that the debtor intends to continue payments and retain any collateral, and a debtor's post-confirmation default on a direct-pay debt constitutes a default under the plan. I therefore hold that the Debtor's Plan provided for the Mortgage for purposes of § 1328(a).

2. Was the Mortgage Provided for under § 1322(b)(5)?

Rushmore also argues that the Mortgage was excepted from discharge under § 1328(a)(1), which excepts debts that are "provided for under section 1322(b)(5)." In turn, § 1322(b)(5) states that a plan *may*

> provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

11 U.S.C. § 1322(b)(5). The entirety of Rushmore's argument rests on the fact that the final payment of the Mortgage is undisputably due after the final plan payment. Motion to Dismiss at 6-7. This argument misses one critical detail: based on the statutory text, for a claim to be treated under § 1322(b)(5) two things must be

true: the plan must cure a default *and* the debt must mature after the end of the plan. Here, Debtors were current on the Mortgage as of the petition date, so there was no arrearage, and nothing in the record indicates there was any other type of default to be cured.

It does not appear that any courts within the Ninth Circuit have addressed this issue; however, courts outside the circuit have generally agreed that when a long term debt is paid directly by the debtor without the cure of an arrearage or other default, section 1322(b)(5) is not implicated. *E.g., In re Rogers*, 494 B.R. 664, 669 (Bankr. M.D. Fla. 2013) ("§ 1322(b)(5) does not except the debt forming the basis of [creditor]'s claim from discharge because the debtors' confirmed plan did not contain a provision to cure prepetition arrears or default."); *Citizens Bank v. Cramer (In re Cramer)*, 477 B.R. 736, 739-740 (Bankr. E.D. Wisc. 2012) (debtors' plan provided for direct payment on secured claim; because plan did not make specific reference to § 1322(b)(5), section 1328(a)(1) did not apply); *but see Suncoast Credit Union v. Dukes (In re Dukes)*, 2015 WL 3856335, at *5 (Bankr. M.D. Fla. 2015, Jun. 19, 2015) ("[W]hen [a] claim is 'long term debt' and the plan proposes for the debtor to maintain payments, the claim is provided for under § 1322(b)(5) and excepted from discharge under § 1328(a)(1). This is the case . . . even if payments are current on the petition date and there is no default to be cured.").

I hold that for a debtor to provide for a claim under § 1322(b)(5), the plan must cure a default. Because there was no default, and therefore no cure, the Mortgage was not provided for under § 1322(b)(5) and the exception to discharge enumerated in § 1328(a)(1) does not apply.

B. The Role of § 1322(b)(2)'s Anti-Modification Provision

As discussed above, I hold that the Plan provided for the Mortgage, and that the exception to discharge under § 1328(a)(1) does not apply. At first glance, the chapter 13 discharge would seem to apply. There is, however, one additional matter—not briefed by either party—that I must address. Although a chapter 13 plan may modify the rights of claimholders, such power does not extend to "a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). Here, the Mortgage is secured by a lien on the Debtors' primary residence, and discharge of the Debtors' personal liability would constitute a modification of the Mortgage holder's rights.

The court is thus faced with two conflicting statutory provisions: one that seems to discharge Debtor's personal liability on the Mortgage, and another that seems to prohibit this very result. Conflicts such as this are generally acknowledged as statutory ambiguities that call for judicial interpretation. In the words of the Supreme Court:

> Where words conflict with each other, where the different clauses of the instrument bear upon each other and would be inconsistent unless the nature and common import of the words be validated, interpretation becomes necessary; and to depart from the obvious meaning of words is justifiable.

Sturges v. Crowninshield, 17 U.S. 122, 202-203 (1819), *quoted in* 2A Norman & Shambie Singer, *Sutherland Statutory Construction* § 46:4 (7th ed. rev. 2015). Yet in this situation, the standard tools of statutory construction themselves lead to unclear results.

On the one hand, there is the maxim of the specific over the general, stating that "[w]here both a specific and a general statute address the same subject matter, the specific one takes precedence regardless of the sequence of the enactment, and must be applied first." *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1192 (9th Cir. 2000) (*quoting In re Khan*, 172 B.R. 613, 624 (Bankr. D. Minn. 1994) (internal quotation marks omitted; alteration by Ninth Circuit)). This principle counsels in favor of holding that Debtors' liability is not discharged, since the anti-modification provision of § 1322(b)(2) is more specific than the generalized discharge statute.

On the other hand, the doctrine of *expressio unius est exclusio alterius* provides that "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *Blausey v. U.S. Trustee*, 552 F.3d 1124, 1133 (9th Cir. 2009). Section 1328(a) enumerates several exceptions to discharge, and the Mortgage does not fall within the scope of any of these exceptions. Thus, the *expressio unis* maxim weighs in favor of discharging the Debtors' liability.

This appears to be a situation with no clear answer. Ultimately, I hold that the Debtors' personal liability on the Mortgage is discharged, for two reasons. First, in light of the unclear results of the standard canons of statutory construction, I am guided by the Ninth Circuit's bankruptcy-specific instruction that "exceptions to discharge should be confined to those plainly expressed . . . and should be strictly construed in order to serve the . . . purpose of giving debtors a fresh start." *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101,

1104 (9th Cir. 2005) (citations and internal quotation marks omitted). Second, the anti-modification provision is framed as a limitation on what a *plan* can accomplish. 11 U.S.C. § 1322(b) ("Subject to subsections (a) and (c) of this section, the plan may..."). Here, the Debtors' Plan did not purport to modify the rights of the Mortgage-holder—the Plan itself was silent. Arguably it is the Bankruptcy Code (and specifically, § 1328(a)) that modified the creditor's rights. To analogize, one right that is routinely relied upon by mortgage creditors is the ability to foreclose a security interest. During the course of a chapter 13 case, that right is impaired by operation of the automatic stay, yet I am aware of no authority holding that the continued operation of the stay is a violation of the anti-modification provision. Similarly, Rushmore's rights as holder of the Mortgage are modified, but this modification is directed by the Code, not by the provisions of the Debtor's Plan.

CONCLUSION

Based on the foregoing findings and conclusions, I hold that Debtors' personal liability on the Mortgage was discharged as part of their chapter 13 case. Debtors must still prove that Rushmore violated the discharge injunction and whether damages should be awarded. Debtor's counsel should upload an order denying the Motion to Dismiss within seven days. Pursuant to the agreement of the parties at the November 30, 2015, hearing, Rushmore's response to Debtors' summary judgment motion (ECF No. 93) is due two weeks after the date of this opinion.