NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. SC-08-1112-MoJuKw
KENNETH EADY,	Bk. No. 03-04553
Debtor.	Adv. No. 07-90271
KENNETH EADY,	
Appellant,	
v.	**M E M O R A N D U M**[1]
BANKRUPTCY RECEIVABLES MANAGEMENT,	
Appellee.	

Argued and Submitted on September 18, 2008
at San Diego, California

Filed - November 18, 2008

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable James W. Meyers, Bankruptcy Judge, Presiding

Before: MONTALI, JURY and KWAN,[2] Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Robert N. Kwan, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

Debtor-Appellant, Kenneth Eady ("Eady"), appeals a summary judgment entered in favor of Creditor-Appellee, Bankruptcy Receivables Management. Because Creditor-Appellee did not violate the discharge injunction of section 524,[3] we AFFIRM the bankruptcy court's decision granting summary judgment in its favor and denying Eady's motion for summary judgment.

I. FACTS

On May 28, 1999, Eady was approved for a revolving charge account with Daniel's Jewelers, the dba of Sherwood Management Company ("Daniel's"). As part of its standard business practice, Daniel's sends approved customers a credit card along with a document entitled "Daniel's Jewelers Retail Installment Credit Agreement" ("Credit Agreement"), which informs customers that they grant Daniel's a purchase money security interest in all goods purchased on the account. The initial credit application signed by Eady also refers to this Credit Agreement. Eady does not dispute getting the Credit Agreement, although he may not have read it or fully understood the terms, but he does dispute its sufficiency in creating a valid purchase money security interest under California law.[4]

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 ("BAPCPA").

[4] The bankruptcy court abstained from hearing this issue since it was pending in state court. Eady's counsel apprised the Panel at oral argument that the state court determined Daniel's had a valid security interest, but its decision is currently on appeal.

Over time, Eady purchased several pieces of jewelry on credit with Daniel's. On October 25, 2000, Eady charged a 1.0 Carat Diamond Ladies Ring ("Ladies Ring") for $1,999.95 plus tax of $155.00 (total $2,154.95), the ring at issue in this case. Between October 26, 2000 and May 9, 2001, Eady purchased a gold charm ("Charm") for $99.95 plus tax, and a 1.0 Carat Gents Diamond Ring ("Gents Ring") for $1,399.95 plus tax. The record reflects that Eady's monthly payment of $200.00 on May 30, 2001, was his last. At the time of his final purchase sometime in 2001, Eady's account balance was $2,572.71.

Eady filed for relief under Chapter 13 on May 12, 2003. Thus, at the time of petition, Eady had been in default with Daniel's for approximately two years. In his Schedule B, Eady listed "Misc. Jewelry" with a value of $1,500.00. On his Schedule F, he listed Daniel's as a "Judgment" creditor with an unsecured claim of $3,327.00.

On September 18, 2003, Daniel's assigned Eady's account to Creditor-Appellee, Bankruptcy Receivables Management ("BRM"), for BRM to ascertain the location and/or disposition of the collateral and settle and compromise Daniel's in rem rights.[5] According to BRM, the collateral securing the unpaid balance on Eady's account was the Ladies Ring, the Gents Ring, and Charm.

Eady's Chapter 13 plan was confirmed on September 25, 2003. It did not provide for any payments to Daniel's.

[5] At this point, BRM was acting as a collection agent for Daniel's.

BRM filed a proof of claim on November 11, 2004, after the deadline of September 17, 2003, and due to a "clerical error" filed an amended proof of claim on December 21, 2004, changing the value of collateral from $2,000.00 to $3,500.00. Eady objected to Daniel's claim as untimely, and BRM eventually withdrew its claim.[6] On December 28, 2004, Daniel's assigned all of its interest in the Ladies Ring to BRM.

Shortly thereafter, Eady claimed he was no longer in possession of the Charm, so BRM agreed to waive its right of possession to the Charm in exchange for the Gents and Ladies Rings. Eady surrendered the Gents Ring sometime before March 31, 2005, but allegedly never surrendered the Ladies Ring.

After making all of his plan payments, Eady received a discharge on August 31, 2005. Approximately nine months after discharge, on May 26, 2006, BRM sent a "Post Discharge Property Retention Agreement" ("PDPRA") directly to Eady, even though he was represented by counsel. The PDPRA purportedly allowed Eady to retain possession of the Ladies Ring in exchange for payments of $170.00 per month, at an annual interest rate of 10% (reduced from the original 22.92%), and stated the "parties agree that the current 'Fair Market Value' of the [Ladies Ring] is $2,154.95," the "principal balance due." For its consideration, BRM agreed to refrain from pursuing any recovery actions against Eady. The letter also offered Eady the options of purchasing the Ladies Ring for a "lump-sum cash settlement" or surrendering it. Eady

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[6] In explaining why it withdrew its claim, BRM contends that it reached a settlement with Eady who agreed to surrender all collateral in full satisfaction of BRM's claim.

refused to sign the agreement. By its own admission, BRM knew of Eady's discharge at the time it solicited the PDPRA.

When BRM got no response from Eady, on June 6, 2006, it sent another letter informing Eady that its client, Daniel's, had a perfected security interest in the Ladies Ring and, since Eady did not "reaffirm the debt . . . or redeem the collateral for its fair market value during [his] bankruptcy proceeding," Daniel's was entitled to possess the ring and demanded its return. The letter also told Eady that he "may be subject to a judgment against [him] for the return of the collateral or its fair market value." BRM alleges Eady did not respond to the second letter. A subsequent letter followed on June 21, 2006, demanding that Eady surrender the Ladies Ring since he failed to satisfy the lien. Again, BRM alleges that Eady did not respond to the third letter.

To the contrary, Eady claims that he offered to return the Ladies Ring "on multiple occasions and each offer was rejected by [BRM]," and "to date, [BRM] refuses to accept the [Ladies] Ring."

On October 17, 2006, BRM sued Eady[7] in California Superior Court ("State Court"). In its complaint, BRM requested either possession and damages for wrongful detention of the collateral after discharge, not for an amount greater than $1,000.00, plus costs of suit; or, alternatively, a money judgment for the value of the collateral in the sum of $2,154.95, plus damages for wrongful detention after discharge not to exceed $1,000.00, plus

[7] BRM's complaint also listed Mrs. Sharon Eady as a defendant, but she was dismissed from the suit on August 24, 2007.

interest from the time of conversion, and costs of suit. Sometime thereafter, Eady filed a "Notice of Stay" with the State Court.[8]

On May 10, 2007, Eady filed a complaint in bankruptcy court, alleging two claims: 1) that BRM willfully violated section 524(a)(2) - the discharge injunction - when it committed unlawful conduct by commencing its lawsuit in State Court attempting to collect a discharged debt; and 2) that BRM's PDPRA is really an illegal reaffirmation agreement. In sum, regarding the first claim, Eady's underlying argument was that since BRM had no valid security interest, its action commenced in State Court was an unlawful attempt at collecting a discharged debt. For the second claim, Eady asserted that since the Ninth Circuit (and the BAP) found the almost-identical PDPRA to be an illegal reaffirmation agreement in Bankr. Receivables Mgmt. v. Lopez (In re Lopez), 345 F.3d 701 (9th Cir. 2003), the one sent to Eady was illegal as well. Eady sought relief for Civil Contempt, Injunctive and

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[8] The facts regarding BRM's State Court case are as follows: BRM alleged that Eady failed to file an answer, resulting in a default on October 9, 2007, and subsequent default judgment on November 20, 2007, for the value of the collateral - an unknown amount on this record. Eady filed a Motion to Set Aside the Default Judgment on December 12, 2007, claiming that service was improper and that he had filed his answer in bankruptcy court, although he provided no conformed copy of this alleged answer to the State Court. The State Court admonished BRM for the improper service and for knowingly failing to notify Eady's counsel prior to its Request for Entry of Default. It granted Eady's Motion to Set Aside based upon surprise and excusable neglect of his counsel. It also denied attorneys fees to BRM because "[BRM] could have avoided this motion, and indeed, the entire situation. Awarding fees to [BRM] under these circumstances would be unjust."

Declaratory Relief, Coercive Fine, and Punitive Damages. BRM filed its answer on June 11, 2007.

Eady moved for summary judgment on December 21, 2007. On January 28, 2008, BRM filed its opposition to Eady's motion for summary judgment and its own motion for summary judgment. BRM argued that it has a valid security interest, that its in rem rights were still intact after discharge, and therefore its pursuit of the collateral in State Court and attempts to settle with Eady did not constitute violations of section 524. To support its valuation of the Ladies Ring, BRM offered the declaration of its president, Bruce Jackman, who stated that at all times after the October 25, 2000 purchase date, the ring had a fair market value of $2,154.95 or more.

The bankruptcy court heard both motions on February 14, 2008. In its oral ruling determining whether BRM's act of soliciting the PDPRA from Eady violated the discharge injunction, the court stated:

> I think that my role here is on the violation of the permanent injunction - the discharge order and I think on this record I have to declare that I could not find that the creditor or [sic] were acting - without good faith. They had good faith belief. They had a good faith belief they had a security interest. That being the case, I won't find that it's a violation of the permanent injunction and that's the ruling of the court. . . . I do not think it has been determined that these types of security arrangements are invalid or are not effective.

Transcript of Hearing on Plaintiff's Motion for Summary Judgment at 72:5-16 (Feb. 14, 2008).

As to BRM's State Court action or attempted settlement efforts with Eady, the court stated:

> So, I think that the creditors[9] here are acting in good faith. I think that what they do on an obligation that secured interest and collateral - there is someway out. If the only option is for them to file a lawsuit, I don't think that would be good policy for anyone. I think that it's better that parties post-petition recognize the new playing field and try to resolve it with what's in the best interest of all the parties involved. So that's the ruling of the court . . .

Id. at 72:18-73:2.

In its Order of March 5, 2008, the bankruptcy court ruled that since BRM committed no contemptible conduct due to its good faith and reasonable belief that its acts were not prohibited by the discharge injunction, Eady's motion was denied and BRM's motion was granted. The court's Judgment of April 9, 2008, declared that it was abstaining from hearing the validity of BRM's security interest since that issue is pending in State Court and dismissed the adversary proceeding. Eady filed a timely Notice of Appeal on April 18, 2008, pursuant to Rule 8002(a).

II. ISSUE

Did the bankruptcy court err when it denied Eady's motion for summary judgment and granted BRM's motion for summary judgment?

III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157(b)(2)(O) and 1334. Since the court disposed of all issues raised when it granted BRM's motion for summary judgment and abstained from hearing the validity of BRM's security interest,

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[9] We assume the court used the plural "creditors" to include both Daniel's, the assignor, and BRM, the assignee of all claims against Eady.

resulting in dismissal of the adversary proceeding, the order is final and we have jurisdiction under 28 U.S.C. § 158.[10]

IV. STANDARD OF REVIEW

We review summary judgment orders de novo. Tobin v. San Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001). Viewing the evidence in the light most favorable to the non-moving party, we must determine "whether there are any genuine issues of material fact and whether the trial court correctly applied the relevant substantive law." Id. See New Falls Corp v. Boyajian (In re Boyajian), 367 B.R. 138, 141 (9th Cir. BAP 2007).

V. DISCUSSION

A. Discharge Injunction, In Rem Rights, and Contempt.

Although we agree with Eady that the bankruptcy court utilized an incorrect standard of law when it applied a "good faith" or "lack of bad faith" standard to determine whether BRM's acts violated the discharge injunction and was therefore contemptible conduct, this was harmless error.[11]

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[10] An order granting dismissal is final and appealable "if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." Nat'l Distribution Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997).

[11] Fed. R. Civ. P. 61, incorporated by reference into Rule 9005, provides in relevant part:

> "Unless justice requires otherwise, no error . . . by the court . . . is ground for . . . vacating, modifying, or otherwise disturbing a judgment or order."

Section 524 embodies the "fresh start" concept and provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any [discharged] debt as a personal liability of the debtor." Pre-petition liens, however, survive bankruptcy and remain enforceable unless they are avoidable under the Code. Johnson v. Home State Bank, 501 U.S. 78, 84 (1991). Therefore, the discharge only bars an in personam action against the debtor, leaving intact an in rem action against the debtor to recover property. Id.

A creditor who attempts to collect a pre-petition discharged debt in violation of the discharge injunction is in contempt of the bankruptcy court that issued the order of discharge. Cox v. Zale Del. Inc., 239 F.3d 910, 915 (7th Cir. 2001); 4 Collier on Bankruptcy ¶ 524.02[2][c] (15th rev. ed. 2008). In addition to the bankruptcy court's inherent power to impose an order for contempt only upon a showing of "bad faith," section 105 grants statutory contempt powers and a creditor may be liable under section 105 if it willfully violated the permanent injunction of section 524. Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 509 (9th Cir. 2002); see Hardy v. U.S. (In re Hardy), 97 F.3d 1384, 1389-90 (11th Cir. 1996).

A debtor can bring a contempt claim under section 105 as a remedy for a creditor's willful violation of the discharge injunction, and relief may include an award of compensatory damages and attorney's fees incurred as a result of a violation.

Walls, 276 F.3d at 507.

The party seeking contempt sanctions has the burden of proving by clear and convincing evidence that the contemnors violated a specific and definite order of the court. Bennett, 298 F.3d at 1069. The burden then shifts to the contemnors to demonstrate why they were unable to comply. Id. " '[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.' " Id. (citing Hardy, 97 F.3d at 1390). For the second prong, the court employs an objective test and "the focus of the [] inquiry . . . is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." Bassett v. Am. Gen. Fin. (In re Bassett), 255 B.R. 747, 758 (9th Cir. BAP 2000)(rev'd on other grounds, 285 F.3d 882 (9th Cir. 2002)); accord McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949)(because civil contempt serves a remedial purpose, it matters not with what intent the defendant did the prohibited act).

In its motion for summary judgment, BRM cited Diamontiny v. Borg, which held that "[i]f a defendant's action 'appears to be based on a good faith and reasonable interpretation of [the court's order],' he should not be held in contempt." 918 F.2d 793, 797 (9th Cir. 1990). The bankruptcy court relied on this "good faith" standard.

However, Diamontiny is distinguishable from this case. Diamontiny was in the context of imposing contempt under the court's inherent power, not a statutory power involving a

creditor under section 105, which applies a different standard. In Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003), the Ninth Circuit applied the same test for violations of the automatic stay under section 362(h) to violations of the discharge injunction under section 524, and held that there can be no doubt the [discharge injunction] qualifies as a specific and definite order, and the finding for contempt under section 105 turns not on a finding of "bad faith" or subjective intent, but rather on a finding of "wilfulness." Moreover, belief by a creditor that its actions do not violate the injunction does not preclude an award of damages against it based upon its "willful" violation. Mitchell v. BankIllinois, 316 B.R. 891 (Bankr. S.D. Tex. 2004); see Henkel v. Lickman (In re Lickman), 297 B.R. 162 (Bankr. M.D. Fla. 2003)(motivation or belief of party charged with violation of the injunction is irrelevant in assessing whether the violation was willful).

Consequently, Ninth Circuit case law is clear that for a finding of contempt under section 105, the focus is not on whether BRM subjectively and in good faith thought it had a valid security interest when it attempted to recover the Ladies Ring or its value, but rather on whether BRM's intended acts - soliciting a PDPRA that could potentially be invalid, subsequent demand letters, and State Court action - violate the discharge injunction. In other words, BRM's subjective belief that it had a valid security interest does not dispense with the issue of whether the value of its alleged secured collateral, the Ladies Ring, was actually $2,154.95, the purchase price (plus sales tax) six years prior.

Therefore, the bankruptcy court erred when it applied an incorrect standard of law for contempt under section 105 by focusing on BRM's good faith belief that it had a security interest, rather than on the contents of the underlying PDPRA and whether it violated the discharge injunction. However, because BRM did not violate the discharge injunction, as we discuss below, this error was harmless and does not alter our affirmance of BRM's motion for summary judgment.[12]

B. Soliciting The PDPRA From Eady Did Not Violate The Discharge Injunction or Lopez Because It Did Not Attempt To Collect A Previously Discharged Debt.

Eady argues that the PDPRA, which is essentially identical to the one found invalid in Lopez, unlawfully attempted to collect from Eady a previously discharged debt. Further, in light of Lopez, in which BRM was the defendant, BRM could not claim ignorance of the discharge injunction, or that it still had a good faith and reasonable belief that soliciting the PDPRA was not a prohibited act. As a result, he asserts the court clearly erred when it granted BRM summary judgment without considering and addressing whether BRM's solicitation of the PDPRA was a willful violation of the discharge injunction.[13]

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[12] Because the bankruptcy court's error did not affect Eady's substantial rights, we may affirm on any grounds supported by the record. Canino v. Bleau (In re Canino), 185 B.R. 584, 594 (9th Cir. BAP 1995).

[13] Eady also argues that under McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668 (9th Cir. 1998), BRM's sole remedy was repossession when Eady failed to maintain payments. Pre-BAPCPA, section 521 gave debtor's the option of redeeming, reaffirming, or surrendering property securing a consumer debt. In Parker, a pre-BAPCPA case, the Ninth Circuit (continued...)

Eady's sweeping view of Lopez is incorrect, and we agree with the bankruptcy court that Lopez did not hold all PDPRA's, no matter what the terms, are in fact illegal and unenforceable post-discharge agreements. Lopez was fact-specific; it held that PDPRA's can be valid if a creditor is attempting to collect only the value of the secured collateral, its in rem right, as opposed to collecting the entire pre-petition balance of debtor's charge account like in Lopez, some of which was in personam discharged debt. However, if a PDPRA attempts to recover even one penny of discharged debt it cannot qualify as a reaffirmation agreement for the same reason in Lopez - it fails to comply with the requirements of section 524(c).[14]

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[13](...continued)
recognized a fourth option - "keep and pay." 139 F.3d 668, 673 (9th Cir. 1998)(as long as debtor keeps current under the original agreement with secured creditor, debtor not required to reaffirm or redeem, and creditor must accept payments or repossess if debtor defaults).

Under Parker, Eady had no right to "keep and pay" the Ladies Ring because he was in default on his Daniel's charge account for almost two years prior to filing Chapter 13.

[14] Section 524(c), in relevant part, provides:

> An agreement between a holder of a claim and the debtor, the consideration for which, **in whole or in part**, is based on a debt that is dischargeable . . . is enforceable only to any extent enforceable under applicable nonbankruptcy law . . . only if—
>
> (1) such agreement was made before the granting of the discharge under section . . . 1328 of this title; [and]
>
> . . . .
>
> (3) such agreement has been filed with the court . . . .

(emphasis added).

BRM admits that it knew of Eady's discharge and that it intended to send him the PDPRA. Therefore, the question is did BRM's act of soliciting the PDPRA (and sending subsequent demand letters) violate the discharge injunction? Obviously, that can only be answered by analyzing the terms of the PDPRA.

Leaving aside the issue of consideration, which is irrelevant for this analysis, and assuming that BRM has a valid security interest, the validity of the PDPRA turns on what BRM was trying to collect. If it was attempting to collect more than the actual value of the Ladies Ring, then per the section 524 injunction and Lopez, that amounts to a willful attempt to collect a discharged in personam debt and contempt is proper. If the PDPRA was attempting to collect the actual value of the Ladies Ring and nothing more, then it would not be a violation of the discharge injunction because BRM was simply exercising an in rem action to recover the value of its collateral. In re Anderson, 348 B.R. 652, 655 (Bankr. D. Del. 2006) (where creditor's action is limited to an in rem action, there can be no violation of the discharge injunction).[15] Finally, if the value of the Ladies Ring was something less than $2,154.95, a post-discharge agreement attempting to collect any part of in personam discharged debt outside the confines of section 524 is illegal, violates the discharge injunction, and subjects BRM to contempt.

[15] Undoubtedly, if it turns out that BRM has no valid security interest, then the act of soliciting the PDPRA and sending demand letters violated the discharge injunction and contempt sanctions are proper. See fn. 4.

Eady alleged in his complaint and argued in his appellate brief that the Ladies Ring was worth something less than $2,154.95, especially considering five and one half years of wear and tear. Admittedly, BRM offered no explanation in either the PDPRA or its demand letters as to how it derived at a value of $2,154.95, or why "fair market value" was the proper valuation standard under section 506.[16] However, Eady never presented to the bankruptcy court any admissible evidence in his summary judgment motion, or in his response to BRM's summary judgment motion, suggesting what that lesser value might be to put the material fact of value in dispute. In other words, he did not provide competent evidence to counter BRM's proof via Jackman's declaration that the Ladies Ring was worth $2,154.95. Therefore, his attempts to raise the issue of value for the first time on appeal will not be considered.[17] Since Eady did not sufficiently raise any genuine issue of material fact as to BRM's valuation of the Ladies Ring, we must assume that $2,154.95 was the proper value.

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[16] Although section 506(a) was revised by BAPCPA and imposes a "replacement value" standard for personal property of individuals in Chapter 7 or Chapter 13, this case arose pre-BAPCPA and thus section 506(a) is not determinative. Courts pre-BAPCPA vary on what valuation standard (replacement, liquidation, forced-sale, etc.) under section 506(a) applies in these circumstances.

[17] Generally, appellate courts do not consider arguments "that are not 'properly raise[d]' in the trial courts." O'Rourke v. Seaboard Sur. Co. (In re Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989). See Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001) (court will not consider issue raised for first time on appeal absent exceptional circumstances).

Consequently, the contents of the PDPRA did not violate the discharge injunction under section 524, and therefore BRM's acts of soliciting it and its subsequent demand letters and State Court action did not constitute contemptible conduct under section 105.[18] Accordingly, the bankruptcy court was correct when it denied Eady's motion for summary judgment and granted BRM's motion for summary judgment.

VI. CONCLUSION

Based upon the foregoing reasons, we AFFIRM the bankruptcy court's decision granting BRM's motion for summary judgment and denying Eady's motion for summary judgment.

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[18] BRM incorrectly argues that its PDPRA is in essence a redemption agreement under section 722 and that Eady had the "right" to enter into such an agreement. Section 722, in relevant part, provides:

> An individual debtor may . . . redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 . . . or has been abandoned under section 544 . . . by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

Section 722 expressly grants only Chapter 7 debtors the right to redeem. See section 103(b)(subchapters I and II of chapter 7 apply only in cases under chapter 7). Since section 722 appears in subchapter II, it applies only to debtors in Chapter 7. Therefore, redemption under section 722 is not available to a Chapter 13 debtor such as Eady.