

APR 26 2005

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In re:)	BAP No.	NV-04-1419-MaRP
)		
FELIX DIAZ,)	Bk. No.	S-99-15928-BAM
)		
Debtor.)		
_____)		
)		
AMERICAN GENERAL FINANCE,)		
)		
Appellant,)		
)		
v.)		
)		
FELIX DIAZ; KATHLEEN MCDONALD,)		
Chapter 13 Trustee,)		
)		
Appellees.)		
_____)		

MEMORANDUM¹

Argued and Submitted on January 21, 2005
at Las Vegas, Nevada

Filed - April 26, 2005

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Before: MARLAR, RUSSELL² and PERRIS, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Barry Russell, Chief Bankruptcy Judge for the Central District of California, sitting by designation.

1 **INTRODUCTION**

2
3 In this case, a creditor sought to have its secured claim
4 paid in full and its collateral, too.

5 Near the end of a five-year plan, the chapter 13³ debtor
6 objected to the creditor's proof of claim for the principal due
7 under a contract for the purchase of a water softener. By that
8 time, not only had the creditor already been paid \$4,903 on its
9 secured claim by the chapter 13 trustee, but it had already
10 repossessed the valueless water softener in accordance with terms
11 of the confirmation order and plan for the surrender of the
12 collateral.

13 The bankruptcy court sustained the objection and ordered the
14 creditor to disgorge the difference between what it had been paid
15 and what it should have been entitled to under the plan for its
16 unsecured deficiency claim. Since distribution on the unsecured
17 claims would likely be zero, the creditor appealed the bankruptcy
18 court's order, contending that its proof of secured claim was
19 deemed allowed and that Debtor's objection was either untimely or
20 barred by laches.

21 Under these circumstances, we conclude that the bankruptcy
22 court properly treated the extant claim as an unsecured deficiency
23 debt, and AFFIRM the order sustaining Debtor's objection.

24
25
26 _____
27 ³ Unless otherwise indicated, chapter and section references
28 are to the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330, and rule
references are to the Federal Rules of Bankruptcy Procedure, Rules
1001-9036.

1 **FACTS**

2
3 In 1998, Felix Diaz ("Debtor") entered into a retail
4 installment contract with Superior Water Systems ("Superior") to
5 purchase a water softener for \$5,912.52 including interest.
6 Pursuant to a dealer agreement, Superior assigned the contract to
7 American General Finance ("American General"), who financed the
8 purchase.

9 In July, 1999, Debtor filed a chapter 13 petition. On his
10 bankruptcy schedules, Debtor listed American General as an
11 unsecured nonpriority creditor with a claim of \$5,613.93, further
12 described as "Water Softener to Surrender." However, Debtor's
13 Statement of Intention Re: Secured Consumer Debts did not include
14 American General, and under paragraph 1(a)--"Property to be
15 Surrendered"--it stated "None."

16 American General filed a timely secured proof of claim for
17 \$4,000 plus 10% interest, based on the water softener's estimated
18 fair market value, together with an unsecured deficiency proof of
19 claim in the amount of \$1,504.76.

20 Debtor's proposed plan did not provide for payment of
21 American General's secured claim, nor did it provide for surrender
22 of the water softener. Under paragraph 9--"Collateral to be
23 surrendered"--it said "None." American General did not object to
24 the plan.

25 The bankruptcy court confirmed the uncontested plan on
26 October 18, 1999. The plan that was attached to the confirmation
27 order differed from the original plan in one important respect.
28 Paragraph 9 now states as follows:

- 1 9. COLLATERAL TO BE SURRENDERED: NONE
2 A. (1) To: American General Finance
3 (2) Collateral: water softener

4 Order Confirming Plan (October 18, 1999).

5 The confirmation order was not served upon interested
6 parties. Nonetheless, on December 8, 1999, Superior repossessed
7 the water softener, which had no resale value.

8 In August of 2000, the chapter 13 trustee ("Trustee") filed a
9 notice of intent to pay claims. According to the notice, American
10 General's \$4,000 (plus 10% interest) secured claim was to be paid
11 100%. While the \$1,504.76 deficiency claim was not listed, it was
12 clear from the notice that there would be no distribution to any
13 unsecured claimants. The notice was certified as having been
14 mailed to Debtor. The notice provided that any objections should
15 be made within 30 days of the date of the notice. Debtor did not
16 file an objection within that time period.

17 However, two years later, in February and March of 2002,
18 Debtor faxed a "letter of dispute" to American General, objecting
19 to its receipt of payments. Between 2000 and 2004, American
20 General received payments totaling \$4,903.

21 In March, 2004, as the five-year plan drew to a close,
22 Trustee sent a directive to Debtor calling for payment of the
23 \$7,108 plan balance. At or around the time for the 57th plan
24 payment, Debtor filed an objection to American General's secured
25 proof of claim and a request for turnover of all the monies it had
26 been paid through the plan.

1 At the hearing on the objection, the bankruptcy court
2 analyzed the situation under § 506(a).⁴ Since American General
3 had repossessed the water softener, and, by its own admission, it
4 was worthless, the bankruptcy concluded that American General's
5 secured claim had been improperly classified and paid, and was
6 merely an unsecured deficiency claim.

7 The order, which was entered on August 19, 2004, sustained
8 Debtor's objection and stated, in part, that American General
9 "must disgorge the difference between how much they would have
10 received as an unsecured claimant less what they were paid."
11 American General timely appealed the order.

12
13 **ISSUES**
14

- 15 1. Whether American General's secured claim was satisfied
16 by surrender of the water softener, thus resulting in
17 its unsecured deficiency claim.
- 18
- 19 2. Whether American General received adequate notice of the
20 treatment of its secured claim by surrender of the
21 collateral.
- 22
- 23 3. Whether Debtor's objection was either untimely or barred
24 by laches.
- 25

26 _____
27 ⁴ Section 506(a) provides, in pertinent part:

28 (a) An allowed claim of a creditor secured by a lien on
property in which the estate has an interest . . . is a
secured claim to the extent of the value of such
creditor's interest in the estate's interest in such
property

11 U.S.C. § 506(a).

1 **STANDARD OF REVIEW**

2
3 We review issues of law under the de novo standard, and
4 findings of fact for clear error. Shook v. CBIC (In re Shook),
5 278 B.R. 815, 820 (9th Cir. BAP 2002). Questions of adequate
6 notice for purposes of due process are also reviewed de novo.
7 Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir. 1997);
8 Educ. Credit Mgmt. Corp. v. Repp (In re Repp), 307 B.R. 144, 148
9 (9th Cir. BAP 2004). A bankruptcy court's interpretation of a
10 chapter 13 plan is a conclusion of law that is also reviewed de
11 novo. See N.Y. City Employees' Retirement Sys. v. Sapir (In Re
12 Taylor), 243 F.3d 124, 128 (2d Cir. 2001).

13 We review for an abuse of discretion the court's exercise of
14 its equitable authority, such as its decision whether or not to
15 apply the doctrine of laches. Shook, 278 B.R. at 820.

16
17 **DISCUSSION**

18
19 **A. Plan's Treatment of American General's Secured Claim**

20
21 American General contends that its secured proof of claim was
22 deemed allowed and should have been paid through the plan.
23 Indeed, Trustee's notice of intent to pay claims was proof that it
24 was treated that way under the plan. We agree that the secured
25 claim was deemed allowed, but disagree that payment was proper.

26 Section 502(a) provides, in material part, that "[a] claim or
27 interest, proof of which is filed under section 501 of this title,
28 is deemed allowed, unless a party in interest . . . objects."

1 11 U.S.C. § 502(a).

2 Under § 1325(a)(5), a debtor's proposed chapter 13 plan must
3 either provide that the secured creditor retain its lien and be
4 paid the value of its claim over the life of the plan or, in the
5 alternative, that the debtor surrender the secured property.

6 The plan, as filed, did not address any treatment for
7 American General's secured proof of claim. However, the confirmed
8 plan stated that Debtor would surrender the water softener to
9 American General.

10 Section 1325(a)(5)(C) permits a chapter 13 debtor to satisfy
11 an allowed secured claim provided for by the plan by surrendering
12 the property securing the claim. Ordinarily, the creditor would
13 then have only a deficiency claim remaining against the estate in
14 a sum equal to the difference between the amount which would be
15 received upon liquidation or foreclosure and the total amount of
16 the debt. Such deficiency claim is, by operation of § 506(a), a
17 general unsecured claim. See In re Mason, 315 B.R. 759, 761-62
18 (Bankr. N.D. Cal. 2004) (at any time after surrender of
19 collateral, a lienholder's claim becomes a wholly unsecured claim
20 by operation of § 506(a))⁵; 8 Collier on Bankruptcy ¶ 1325.06[4],
21 p. 1325-41 to 42 (Alan N. Resnick & Henry J. Sommer eds., 15th ed.
22 rev. 2004) ("The applicable provisions of the Uniform Commercial
23 Code control the disposition of collateral surrendered under
24 section 1325(a)(5)(C) with the result that the holder of an
25 allowed secured claim would be entitled to an allowed unsecured

27 ⁵ But see Chrysler Fin. Corp. v. Nolan (In re Nolan), 232
28 F.3d 528, 535 (6th Cir. 2000) (chapter 13 debtor cannot modify the
plan after confirmation to surrender a car and treat any
deficiency as an unsecured claim under § 506(a)).

Our case does not involve a plan modification. Therefore,
policy concerns about reclassification of a secured claim are not
at issue.

1 claim for the amount remaining due the holder after an appropriate
2 disposition of the surrendered collateral, unless the debtor and
3 the holder otherwise agree or unless the collateral was accepted
4 by the creditor in full satisfaction of the entire claim in
5 accordance with U.C.C. Revised § 9-620 or other applicable
6 nonbankruptcy law.”).

7 The evidence that Trustee distributed the funds to American
8 General was not dispositive of American General’s claim status
9 because the plan was subject to the court’s interpretation.⁶ A
10 reorganization plan should be construed basically as a contract.
11 See Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d
12 581, 588 (9th Cir. 1993).

13 Here, the bankruptcy court determined that American General’s
14 claim was improperly paid as a secured claim. This conclusion was
15 correct because the confirmed plan provided for surrender of the
16 water softener, and American General, through Superior,
17 immediately after confirmation, repossessed the collateral. The
18 court then applied § 506(a) to determine that the filed claim was,
19 in fact, wholly unsecured. This was the correct approach.
20 Under § 506(a), the estate no longer had an interest in the
21 property, and American General was free to liquidate its
22 collateral. See 11 U.S.C. § 506(a) (creditor has a secured claim
23 “to the extent of the value of such creditor’s interest in the
24 estate’s interest in such property”). Because the collateral was
25 repossessed, but valueless, American General’s entire claim was
26 left unsecured. Moreover, American General was estopped to claim
27 that it should be paid as a secured creditor when in fact it
28 repossessed its collateral and sold it, or retained it.

⁶ Trustee’s notice was not a final order allowing American General’s claim as a secured claim. Therefore, a reconsideration of the claim under § 502(j) was not implicated.

1 **B. Notice**

2
3 American General maintains that it was unfair to deprive it
4 of the payments under the plan because it did not receive notice
5 of the confirmation order, and the original plan did not contain
6 the surrender provision.

7 Before a creditor's rights may be adversely affected by a
8 chapter 13 plan, the creditor must receive adequate notice and an
9 opportunity to be heard in a manner sufficient to meet due process
10 concerns. See Varela v. Dynamic Brokers, Inc. (In re Dynamic
11 Brokers, Inc.), 293 B.R. 489, 500 (9th Cir. BAP 2003) (chapter 11
12 plan could affect creditor's claim only if specific notice was
13 provided that would satisfy due process concerns); Shook, 278 B.R.
14 at 824-25.

15 Although American General is correct that it had no notice of
16 the surrender provision contained in the confirmation order, it
17 obviously had notice that it repossessed its collateral. Had it
18 received proper notice of the confirmation order, there would have
19 been no grounds to object to the surrender of its collateral.
20 Therefore, it was not prejudiced by the lack of notice and its due
21 process rights were not violated.

22 The plan without the surrender provision did not deal with
23 the secured claim. Therefore, the claim objection process governs
24 the amount of the claim.

25
26 **C. Timeliness and Laches**

27
28 American General contends that the bankruptcy court erred in

1 considering Debtor's objection because it was either untimely or
2 barred by the equitable doctrine of laches.

3 American General argues that Debtor's objection was untimely
4 because it was filed beyond the 30-day objection period provided
5 in Trustee's notice of intent to pay claims. The notice and
6 opportunity to object was part of the fulfillment of the chapter
7 13 trustee's duties to distribute payments "in accordance with the
8 plan as soon as practicable," under § 1326(a).

9 However, the time for claim objections is governed by Rule
10 3007.⁷ We held, in Shook:

11 To date, there has been no case law in the Ninth
12 Circuit prohibiting postconfirmation claim objections.
13 Rule 3007 does not provide a time limit for objections
14 to proofs of claims, and such an objection may be filed
15 at any time. Bitters v. Networks Elec. Corp. (In re
16 Networks Elec. Corp.), 195 B.R. 92, 101 (9th Cir. BAP
17 1996).

18 Shook, 278 B.R. at 828.

19 We see no reason to deviate from this flexible interpretation
20 of Rule 3007, which would allow Debtor's postconfirmation
21 objection. In addition, there are equitable considerations
22 present here.

23 American General maintains that Debtor's claim objection was
24 barred by the equitable doctrine of laches. It cites, for
25 support, the panel's Shook opinion, in which we held that the

26 ⁷ Rule 3007 provides:

27 An objection to the allowance of a claim shall be in
28 writing and filed. A copy of the objection with notice of
the hearing thereon shall be mailed or otherwise delivered
to the claimant, the debtor or debtor in possession and
the trustee at least 30 days prior to the hearing. If an
objection to a claim is joined with a demand for relief of
the kind specified in Rule 7001, it becomes an adversary
proceeding.

Fed. R. Bankr. P. 3007.

1 debtors' claim objection, filed four and one-half years after plan
2 confirmation, was barred by laches. To succeed on this
3 affirmative defense, American General "was required to present
4 evidence of an inexcusable delay in the exercise of a known right,
5 and that it was thereby prejudiced." Shook, 278 B.R. at 830.

6 Debtor did not object to Trustee's notice of intent to pay
7 American General 100% of its secured claim. Although Debtor
8 alleged that he did not receive the notice, the notice expressly
9 certified that a copy was sent to Debtor. In any event, Debtor
10 conceded that he knew about the payments. He alleged, without
11 citation to the record, that he contacted the Trustee's office
12 "when the first Statement of Payments was received"
13 Appellee's Brief (December 10, 2004), p. 1. In 2002, he faxed two
14 letters to American General demanding that the payments cease.
15 Nothing was done to bring the matter to the court's attention,
16 however, until after Debtor received the Trustee's directive to
17 pay additional plan funds in March, 2004, and Debtor filed his
18 written claim objection.

19 The facts of this case are distinguishable from those in
20 Shook. In Shook, the creditor filed a proof of secured claim,
21 which was deemed allowed, and the plan and confirmation order were
22 silent concerning the treatment of its claim. The trustee noticed
23 an intent to pay the creditor's claim as a secured claim through
24 the plan, and the debtors failed to object to that treatment.
25 Then the debtors requested, and were given, a release of lien by
26 the creditor. Four and one-half years later, they objected to the
27 claim and demanded a turnover of the funds paid to the creditor,
28 contending that the claim was unsecured. We applied laches, in

1 part, because the creditor was prejudiced by the delay and release
2 of its lien, in reliance on the debtors' request and the payments
3 under the plan. Shook, 278 B.R. at 831 & n.17.

4 Here, American General is as much to blame as Debtor for the
5 delay. American General knew that the water softener had been
6 surrendered and repossessed, but it took the money anyway. It got
7 a windfall, in a legal sense, as well as an economic one.
8 Therefore, American General is not prejudiced by being required to
9 disgorge up to \$4,903 which it received in addition to its
10 collateral.

11 Moreover, the pro per Debtor faxed a "letter of dispute" to
12 American General, in 2002, and believed that American General
13 would resolve the matter. When it did not, and Debtor was
14 directed to pay the \$7,108 plan balance which included the balance
15 of American General's purported secured debt, Debtor took the
16 ultimate step of filing his claim objection in bankruptcy court.

17 Thus, Debtor neither unduly delayed nor avoided his
18 responsibilities to the extent the debtors did in Shook.
19 Therefore, it would have been improper to bar Debtor's claim
20 objection on grounds of laches, and the bankruptcy court did not
21 abuse its discretion in refusing to do so.

22 23 CONCLUSION 24

25 American General continued to accept plan payments on its
26 secured proof of claim after its collateral had been surrendered.
27 This conduct was inequitable because American General was
28 thereafter entitled to only an unsecured deficiency claim. By

1 retaining the collateral and being paid as if it was secured, it
2 in effect received double payment. It could not seek to bar
3 Debtor's timely claim objection under the doctrine of laches when
4 it had not been prejudiced. Therefore, we AFFIRM the order
5 sustaining Debtor's claim objection in its entirety.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28