NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-05-1052-BMoS
LORRAINE WEAVER,	Bk. No. 03-22065-GBN
Debtor.	
LORRAINE WEAVER,	
Appellant,	
v.	**M E M O R A N D U M**[1]
EDWARD J. MANEY, Chapter 13 Trustee; DAN CORNETT; INGEBORG CORNETT,	
Appellees.	

Argued and Submitted on January 20, 2006
at Phoenix, Arizona

Filed - March 17, 2006

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

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Before: BRANDT, MONTALI and SMITH, 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.

Appellees moved for relief from stay to complete a foreclosure. Debtor opposed on the ground that enforcement of her obligation to appellees was barred by the Arizona statute of limitations. The bankruptcy court ruled that debtor's acknowledgment of the obligation in her prior chapter 13[2] plan was sufficient to remove the bar to enforcement, and lifted the stay. Debtor appeals.

We AFFIRM.

I. FACTS

On 23 January 1991 appellant Lorraine Weaver executed a promissory note and deed of trust for $65,000 in favor of appellees Dan and Ingeborg Cornett. Weaver borrowed the funds from the Cornetts to refinance her obligations on her real property in Navajo County, Arizona. At the time of the transaction, Weaver's son was engaged to the Cornetts' daughter; the couple has since married and divorced. The promissory note became due in full on 23 January 1994. Weaver made sporadic payments on the note.

On 24 June 2002 Weaver filed a chapter 7 bankruptcy, listing the Cornetts as creditors. The case was dismissed on 29 July 2002. Shortly thereafter, on 5 August 2002, Weaver filed a chapter 13 petition. Her

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[2] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which the adversary proceeding and these appeals arise was filed before its effective date (generally 17 October 2005).

All "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "FRCP" references are to the Federal Rules of Civil Procedure.

"ARS" references are to the Arizona Revised Statutes.

proposed plan in that case contained the following language with respect to the treatment of secured claims:

> DON & INGABORG [sic] CORNETT
>
> No arrearages will be paid on the pre-petition arrearages and costs re: commercial property located at 2753 Highway 260, Overgaard, Arizona, with a value of $425,000.00. Post-petition interest only payments on the original loan amount of $65,000.00 will be made in the sum of $600.00 per month until the property is sold. Upon sale of the property this creditor will be paid in full by proceeds of the sale.

Chapter 13 Plan, Case No. 02-12099, page 2.

The plan was never confirmed, and the case was dismissed 12 May 2003. Thereafter, on 18 September 2003, the Cornetts recorded a Notice of Trustee Sale, with a sale date of 19 December 2003. Weaver filed the instant chapter 13 one day before the sale date, scheduling the debt to the Cornetts at $0 with the notation "LISTED FOR INFORMATION ONLY - DEBT NOT ENFORCEABLE."

The Cornetts moved for relief from stay to continue their foreclosure. Weaver opposed the motion on the ground that the obligation was barred from enforcement by the six-year Arizona statute of limitations, ARS § 12-548. They contended that the statute of limitations did not bar enforcement, as Weaver had effectively revived the obligation under Arizona law by listing and providing for the debt in the chapter 13 plan filed in her first case.

The bankruptcy court set the matter for further hearing, and the parties cross-moved for summary judgment (properly, because the relief from stay motion was a contested matter under Rule 9014, which makes Rule 7056 applicable). At the hearing, the bankruptcy court ruled that the language in debtor's August 2002 chapter 13 plan satisfied the requirements of Arizona law, rendering the debt enforceable notwithstanding expiration of the statute of limitations. The court

denied Weaver's motion for summary judgment, declared the debt enforceable in the amount of $90,325.24, and granted in part Cornetts' motion to allow Weaver time to confirm a plan, provided that the automatic stay would not be lifted until 7 April 2005. Order Modifying Stay, 18 January 2005.

Weaver timely appealed. Recognizing the possibility that the order on appeal may be interlocutory, we granted leave to appeal. The chapter 13 trustee did not file a brief or argue.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1) and (B)(2)(G), and we do under 28 U.S.C. § 158(c).

III. ISSUE

Whether the bankruptcy court erred in concluding that the language in Weaver's chapter 13 plan revived the debt to Cornett under Arizona law.

IV. STANDARDS OF REVIEW

We review the grant or denial of relief from stay for abuse of discretion. In re Conejo Enters., Inc., 96 F.3d 346, 351 (9th Cir. 1996). A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1991).

We review the bankruptcy court's interpretation of state law de novo, In re Park at Dash Point, L.P., 985 F. 2d 1008, 1010 (9th Cir. 1993); likewise, the grant or denial of summary judgment. In re Baldwin, 245 B.R. 131, 134 (9th Cir. BAP 2000), aff'd, 249 F.3d 912 (9th Cir.

2001). In reviewing summary judgment, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the bankruptcy court correctly applied relevant substantive law. In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 819 F.2d 214, 215 (9th Cir. 1987); In re Gertsch, 237 B.R. 160, 166 (9th Cir. BAP 1999).

V. DISCUSSION

This appeal turns on one question: whether the language in Weaver's unconfirmed August 2002 chapter 13 plan sufficed to revive her debt to Cornetts. ARS § 12-548 provides:

> An action for debt where indebtedness is evidenced by or founded upon a contract in writing executed within the state shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward.

ARS § 33-816 makes clear that this statute applies to deeds of trust:

> The trustee's sale of trust property under a trust deed shall be made, or any action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the contract secured by the trust deed.

Weaver's note was due in full on 23 January 1994, and it is undisputed the limitations period expired on 23 January 2000.

Arizona law recognizes the principle that acknowledgment of a debt made after expiration of the limitations period may operate to remove the bar to enforcement. ARS § 12-508 provides:

> When an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the action out of the operation of the law, unless the acknowledgment is in writing and signed by the party to be charged thereby.

See also John W. Masury & Son v. Bisbee Lumber Co., 68 P.2d 679 (Ariz. 1937) (discussing history of Arizona statute of limitations and acknowledgment).

The Arizona Supreme Court has set out the requirements for a legally sufficient acknowledgment:

> For an acknowledgment of an indebtedness to effectively remove the bar of the limitation's period the acknowledgment must be in writing; it must be signed by the party to be charged; it must sufficiently identify the obligation referred to, though it need not specify the exact amount or nature of the debt; it must contain a promise, express or implied, to pay the indebtedness; and it must contain, directly or impliedly, an expression by the debtor of the "justness" of the debt.

Freeman v. Wilson, 485 P.2d 1161, 1165-66 (Ariz. 1971). Arizona cases treat the sufficiency of an acknowledgment as a legal rather than factual issue. See e.g., id. at 1166, Masury, 68 P.2d at 684-85, and Steinfeld v. Marteny, 10 P.2d 367 (Ariz. 1932).

The parties agree that the acknowledgment is in writing and signed by Weaver, that it sufficiently identifies the obligation, and contains a promise to pay. Only the last element is in dispute: whether Weaver's chapter 13 plan contains a direct or implicit expression of the justness of the debt.

"Justness . . . refers to the moral obligation which the debtor feels rests upon himself to repay the original obligation." Freeman, 485 P.2d at 1166. No specific language is required to satisfy this element. For example, language in a borrower's letter acknowledging the debt and indicating that borrower and lender had been "the closest friends for many years" and that lender had loaned him his "nest egg" was held to be a sufficient expression of the justness of the debt. Id. at 1165.

Such overt expressions are not required, however. In In re Tolleson's Estate, 166 P.2d 146, 148 (Ariz. 1946), the Arizona Supreme

Court held that the expression of the writer's desire to pay the debt in full was sufficient. On the other hand, language in letters to a vendor that made clear the customer would not pay the amount due in full was found to be, in effect, a denial of the justness of the debt. Masury, 68 P.2d at 693. In short, there is no bright line rule; Arizona's courts have decided each case on its own facts. See Tolleson's Estate, 166 P.2d at 149 (noting that cases cited by appellants were inapplicable, but that the decision in each of them "was undoubtedly justified by the facts").

Weaver argues that the language in her plan expressed no moral obligation to pay. But as pointed out by the bankruptcy court:

> There is nothing in the [plan] which expressly indicates debtor considered the debt a moral obligation as there was in the Freeman case.
>
> However, the debtor did acknowledge a payment of the secured claim within the context of a Chapter 13 plan. The purpose of a bankruptcy filing is to resolve claim disputes.
>
> That debtor was apparently willing to pay a secured claim, and not attempt to resolve the validity of the claim either through the claims objection process offered by the Bankruptcy Code . . . implicitly does express the justness of the debt . . . .

Transcript, 7 January 2005, page 51-52. Weaver points to no flaw in this reasoning, and we see none. The plan language contains an unequivocal promise to pay the obligation in full. Certainly, if there were any dispute about the justness of the obligation, the chapter 13 case would have been the place to raise it: Weaver did not do so.

Apparently she did not dispute the Connett debt in her schedules in that case, and those forms call for debtors to indicate whether any scheduled obligation is disputed, contingent, or unliquidated. Or she could have indicated, as she did in her pending case, that the debt was not enforceable. Those schedules were apparently not before the bankruptcy court, nor are they in the record before us. We are entitled

to presume that she does not regard them as helpful to her argument, In re Captain Blythers, Inc., 311 B.R. 530, 535 n.6 (9th Cir. BAP 2004).

At oral argument, Weaver's counsel argued that the plan language was not an expression of Weaver's intent, as it was drafted by her former counsel, who missed the fact that enforcement was barred by the statute of limitations, and signed by Weaver in reliance upon counsel's advice. The case law does not address whether the party against whom enforcement is sought must know that the statute has run at the time it is acknowledged. However, subjective intent is not a requirement for an effective acknowledgment, see Freeman, 485 P.2d at 1165-66, and in any event there is no evidence in the record of Weaver's knowledge or intent.

Weaver also argues that her 18 June 2002 letter to Cornetts' counsel indicates that she questioned the justness of the obligation. In that letter Weaver requested a payoff figure for the obligation: "As yet I have not received any reply to my request for figures on pay off too cure the breach, alleged taxes payed by Cornetts. (copy of taxes paid). A history of my payments. _____x_____. ect. [sic]." The remainder of the letter chronicles Weaver's unreturned calls to Cornetts' counsel. Although it could be inferred from this letter that Weaver questioned the amount she owed, there was no indication that she questioned the validity of the debt, or that she thought it unjust.

In any event, in a subsequent writing, the chapter 13 plan, she undertook to pay the obligation in full, which she need not have done. As in Tolleson's Estate, this was sufficient.

Finally, Weaver argues that dismissal of a case re-establishes the rights of the parties as of the petition date and restores the pre-bankruptcy status quo, citing In re Serrato, 214 B.R. 219, 227 (Bankr.

N.D. Cal. 1997). See also § 349.[3] The fact that the writing happens to be an unconfirmed chapter 13 plan from a dismissed case is not relevant in this context. The plan acknowledges the obligation, which is all that is required, and Weaver signed it. That the plan was not confirmed means that the parties are not bound by the plan, but it was the plan's language which revived the obligation, with or without confirmation. Weaver did not point out to the bankruptcy court, nor has she in her briefs to us, any authority for the proposition that the dismissal of an action in any court eviscerates the evidentiary effect of a document satisfying the pertinent statute of frauds filed in that action, and we know of none. The dismissal had no impact on the issue presented here.

VI. CONCLUSION

Weaver has not shown the bankruptcy court erred in its conclusion that her chapter 13 plan language revived her obligation to the Cornetts

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[3] Which provides, in pertinent part:

> (a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case . . . of debts that were dischargeable in the case dismissed . . .
>
> (b) Unless the court, for cause, orders otherwise, a dismissal of a case . . .
>
> (1) reinstates--
>
> (A) any proceeding or custodianship . . . superseded;
>
> (B) any transfer avoided . . . , or preserved . . . ; and
>
> (C) any lien voided . . . ;
>
> (2) vacates any order, judgment, or transfer ordered, . . . ; and
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

under Arizona law. The bankruptcy court did not abuse its discretion in lifting the stay. We AFFIRM.