

MAR 17 2006

NOT FOR PUBLICATION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

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**<sup>1</sup>  
 )  
 EDWARD J. MANEY, Chapter 13 )  
 Trustee; DAN CORNETT; )  
 INGEBOG 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.

<sup>1</sup> 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.

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

7 We AFFIRM.

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### I. FACTS

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

18 On 24 June 2002 Weaver filed a chapter 7 bankruptcy, listing the  
19 Cornetts as creditors. The case was dismissed on 29 July 2002. Shortly  
20 thereafter, on 5 August 2002, Weaver filed a chapter 13 petition. Her  
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23 <sup>2</sup> Absent contrary indication, all "Code," chapter and section  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to  
25 its amendment by the Bankruptcy Abuse Prevention and Consumer  
26 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from  
27 which the adversary proceeding and these appeals arise was filed  
28 before its effective date (generally 17 October 2005).

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

"ARS" references are to the Arizona Revised Statutes.

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

3           DON & INGABORG [sic] CORNETT

4           No arrearages will be paid on the pre-petition arrearages  
5           and costs re: commercial property located at 2753 Highway 260,  
6           Overgaard, Arizona, with a value of \$425,000.00. Post-  
7           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.

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

9           The plan was never confirmed, and the case was dismissed 12 May  
10 2003. Thereafter, on 18 September 2003, the Cornetts recorded a Notice  
11 of Trustee Sale, with a sale date of 19 December 2003. Weaver filed the  
12 instant chapter 13 one day before the sale date, scheduling the debt to  
13 the Cornetts at \$0 with the notation "LISTED FOR INFORMATION ONLY - DEBT  
14 NOT ENFORCEABLE."

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

22           The bankruptcy court set the matter for further hearing, and the  
23 parties cross-moved for summary judgment (properly, because the relief  
24 from stay motion was a contested matter under Rule 9014, which makes Rule  
25 7056 applicable). At the hearing, the bankruptcy court ruled that the  
26 language in debtor's August 2002 chapter 13 plan satisfied the  
27 requirements of Arizona law, rendering the debt enforceable  
28 notwithstanding expiration of the statute of limitations. The court

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

6 Weaver timely appealed. Recognizing the possibility that the order  
7 on appeal may be interlocutory, we granted leave to appeal. The chapter  
8 13 trustee did not file a brief or argue.

## 9 10 **II. JURISDICTION**

11 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
12 § 157(b) (1) and (B) (2) (G), and we do under 28 U.S.C. § 158(c).

## 13 14 **III. ISSUE**

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

## 18 19 **IV. STANDARDS OF REVIEW**

20 We review the grant or denial of relief from stay for abuse of  
21 discretion. In re Conejo Enters., Inc., 96 F.3d 346, 351 (9th Cir.  
22 1996). A bankruptcy court necessarily abuses its discretion if it bases  
23 its decision on an erroneous view of the law or clearly erroneous factual  
24 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1991).

25 We review the bankruptcy court's interpretation of state law de  
26 novo, In re Park at Dash Point, L.P., 985 F. 2d 1008, 1010 (9th Cir.  
27 1993); likewise, the grant or denial of summary judgment. In re Baldwin,  
28 245 B.R. 131, 134 (9th Cir. BAP 2000), aff'd, 249 F.3d 912 (9th Cir.

1 2001). In reviewing summary judgment, we must determine, viewing the  
2 evidence in the light most favorable to the nonmoving party, whether  
3 there are any genuine issues of material fact and whether the bankruptcy  
4 court correctly applied relevant substantive law. In re Bishop, Baldwin,  
5 Rewald, Dillingham & Wong, Inc., 819 F.2d 214, 215 (9th Cir. 1987); In  
6 re Gertsch, 237 B.R. 160, 166 (9th Cir. BAP 1999).

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8 **V. DISCUSSION**

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

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

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

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

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

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

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

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

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

6 For an acknowledgment of an indebtedness to effectively  
7 remove the bar of the limitation's period the acknowledgment  
8 must be in writing; it must be signed by the party to be  
9 charged; it must sufficiently identify the obligation referred  
10 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.

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

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

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

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

1 Court held that the expression of the writer's desire to pay the debt in  
2 full was sufficient. On the other hand, language in letters to a vendor  
3 that made clear the customer would not pay the amount due in full was  
4 found to be, in effect, a denial of the justness of the debt. Masury,  
5 68 P.2d at 693. In short, there is no bright line rule; Arizona's courts  
6 have decided each case on its own facts. See Tolleson's Estate, 166 P.2d  
7 at 149 (noting that cases cited by appellants were inapplicable, but that  
8 the decision in each of them "was undoubtedly justified by the facts").

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

11 There is nothing in the [plan] which expressly indicates  
12 debtor considered the debt a moral obligation as there was in  
the Freeman case.

13 However, the debtor did acknowledge a payment of the  
14 secured claim within the context of a Chapter 13 plan. The  
purpose of a bankruptcy filing is to resolve claim disputes.

15 That debtor was apparently willing to pay a secured  
16 claim, and not attempt to resolve the validity of the claim  
17 either through the claims objection process offered by the  
Bankruptcy Code . . . implicitly does express the justness of  
the debt . . . .

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

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

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

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

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

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

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

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

## 13 VI. CONCLUSION

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

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18 <sup>3</sup> Which provides, in pertinent part:

19 (a) Unless the court, for cause, orders otherwise, the dismissal  
20 of a case under this title does not bar the discharge, in a later  
21 case . . . of debts that were dischargeable in the case dismissed

21 . . .

22 (b) Unless the court, for cause, orders otherwise, a  
23 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) reverts the property of the estate in the entity  
in which such property was vested immediately  
before the commencement of the case under this  
title.

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

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