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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No. MT-09-1308-PaMkMo
	)	
DOUGLAS A. SAAREL and	)	Bk. No. 08-61684-RBK
SUSANN E. SAAREL,	)	
	)	Adv. No. 09-00037-RBK
Debtors.	)	
<hr/>		
	)	
	)	
DOUGLAS A. SAAREL and	)	
SUSANN E. SAAREL,	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
Appellants,	)	
v.	)	
	)	
OBB PARTNERS V, LLC,	)	
	)	
Appellee.	)	
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Ordered Submitted Without Oral Argument  
on January 22, 2010<sup>2</sup>

Filed - February 1, 2010

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

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: PAPPAS, MARKELL and MONTALI, Bankruptcy Judges

<sup>1</sup> 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.

<sup>2</sup> The parties advised the Panel that they waived oral argument. Order entered January 20, 2010. See Fed. R. Bankr. P. 8012; 9th Cir. BAP R. 8012-1.

1 Chapter 11<sup>3</sup> debtors Douglas A. and Susann E. Saarel  
2 ("Saarels") appeal the decision of the bankruptcy court denying  
3 their request to quiet title in a commercial property in  
4 themselves in an action against creditor OBB Partners V, LLC  
5 ("OBB"). We AFFIRM.  
6

7  
8 **FACTS**

9 The facts were stipulated by the parties.

10 On May 5, 2005, Saarels obtained a loan from OBB for  
11 \$1.3 million, secured by a mortgage on six parcels of commercial  
12 property owned by the Saarels in Park County, Montana (the  
13 "Property").

14 Saarels and OBB entered into a loan modification agreement on  
15 April 10, 2006, in which OBB agreed to release one parcel of the  
16 mortgaged property in consideration of a partial paydown of the  
17 loan. The agreement and payment reduced the principal balance to  
18 \$597,600, and reduced Saarels' monthly payment from \$13,541.67 on  
19 the loan to \$6,218.75, effective August 5, 2006. The maturity  
20 date for the loan, May 5, 2008, remained unchanged.

21 Saarels failed to make the monthly installments due  
22 November 5 and December 5, 2007. OBB sent Saarels a notice of  
23 default. According to the notice, the amount necessary to cure  
24 the default was \$17,821.68; OBB set a deadline of January 23, 2008  
25 for Saarels to cure the default.  
26

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27 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1           Saarels did not cure the default by January 23, 2008.  
2 Instead, OBB and Saarels negotiated a second loan modification  
3 agreement ("the Second Agreement") entered into on  
4 January 30, 2008. At the same time, and as contemplated by the  
5 Second Agreement, Saarels executed a Nonmerger Deed in Lieu of  
6 Foreclosure conveying the Property to OBB that was deposited with  
7 Guardian Title Escrow in Livingston, Montana.

8           The terms of the Second Agreement relevant in this appeal are  
9 contained in ¶ 1.1(d), which provides:

- 10 (i)           If, on or before March 5, 2008, Borrower brings current  
11 the Loan through and including the March 5, 2008  
12 installment (namely including but not limited to payment  
13 of all monthly installments from and including the  
14 November 5, 2008 installments, accrued and unpaid  
15 interest, late charges, default interest, and costs and  
16 expenses), Lender shall return to Borrower the original  
17 of this Nonmerger Deed in Lieu to Borrower within  
18 seven (7) days of full payment of the amount to cure.  
19 Borrower shall be obligated thereafter to continue to  
20 provide payments in accordance with the Loan Documents,  
21 e.g., the monthly installment due April 5, 2008, and the  
22 balloon payment due May 5, 2008.[<sup>4</sup>]
- 23 (ii)           If Borrower does not satisfy 1.1(d)(i) above,<sup>[5]</sup> but  
24 provides payment in full of the Loan on or before  
25 August 5, 2008, namely including but not limited to full  
26 amount of the principal, accrued and unpaid interest,  
27 late charges, default interest, and costs and expenses,  
28 Lender shall return to Borrower the original of the  
Nonmerger Deed in Lieu within seven (7) days of full  
payment.
- (iii)           If Borrower fails to (a) bring current the Loan through  
and including the March 5, 2008 installment, and

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<sup>4</sup> The parties stipulated in the bankruptcy court that there was no ambiguity in ¶ 1.1(d)(i).

<sup>5</sup> This provision, ¶ 1.1(d)(ii), as originally approved by the parties on January 30, 2008, stated: "If Borrower provides payment in full . . . ." However, this phrase was modified by joint consent of the parties on February 6, 2008, to read as indicated above, "If Borrower does not satisfy 1.1(d)(i) above, but provides payment in full . . . ."

1 (b) provide payment in full of the Loan on or before  
2 August 5, 2008, Lender shall have the right but not the  
3 obligation to record the Nonmerger Deed in Lieu  
4 immediately thereafter, without further notice to  
5 Borrower. In the event Lender records the Nonmerger  
6 Deed in Lieu in accordance with this Agreement, Borrower  
7 also shall cooperate with Lender to effectuate the full  
8 and complete transfer of the Property to Lender, and  
9 shall not interfere in any manner with this transfer.

6 On January 30, 2008, OBB instructed Guardian Title as  
7 follows:

8 Please have the Saarels execute the attached documents  
9 and Jim Shires will forward his signed copies. As  
10 discussed with Jim, please hold the document until the  
11 loan is brought current through the March 5th payment by  
12 March 5, 2008, or the loan is paid in full before  
13 August 5, 2008, per the Agreement.

11 Saarels did not make the payment on or before March 5, 2008,  
12 as required by the Second Agreement. On April 8, 2008, Saarels  
13 requested a statement from OBB of the amount due on the loan for  
14 all delinquent payments from November 5, 2007, through  
15 March 5, 2008. OBB replied by email on the same date that the  
16 total amount was \$40,132.88.

17 Saarels paid OBB \$40,132.88 on April 11, 2008. This payment  
18 did not include the monthly installment due on April 5, 2008,  
19 which by the April 11 payment date was in default. Saarels never  
20 requested return of the Nonmerger Deed in Lieu, and Guardian Title  
21 remained in possession of the deed, after the April 11 payment.

22 Saarels made no further payments to OBB after April 11, 2008.

23 The parties stipulated that no one from OBB ever told Saarels  
24 that the March 5, 2008 deadline to cure the defaults for the  
25 period of November 5, 2007 through March 5, 2008 was waived.  
26 Further, the parties stipulated that there was no written  
27 agreement modifying the Second Agreement.  
28

1           Saarels did not pay the loan in full on or before  
2 August 5, 2008. OBB recorded the Nonmerger Deed in Lieu on  
3 September 18, 2008, effectively transferring title to the Property  
4 from Saarels to OBB.

5           Saarels filed a petition under chapter 11 on  
6 December 2, 2008. Saarels commenced an adversary proceeding  
7 against OBB on June 15, 2009, seeking to quiet title in the  
8 Property in themselves subject to the mortgage of OBB. OBB  
9 answered on July 1, 2009, also asserting a counter-claim seeking a  
10 declaration by the bankruptcy court that title to the Property  
11 vested in OBB upon recording of the Nonmerger Deed in Lieu, and  
12 that the Property was not property of the Saarels' bankruptcy  
13 estate.

14           The parties filed a stipulation on August 7, 2009, submitting  
15 the issues raised in the adversary proceeding to the bankruptcy  
16 court for decision on agreed facts. According to the parties, the  
17 legal issues to be decided by the bankruptcy court were:

- 18 (a) Was the payment deadline of March 5, 2008, specified in the  
19 [Second Agreement], waived by acceptance of the payment of  
20 \$40,132.88 by OBB on April 11, 2008, which, in turn, would  
21 have required OBB to release the escrowed Nonmerger Deed in  
22 Lieu of Foreclosure to Saarels?  
23  
24 (b) Was OBB entitled, pursuant to the terms of the written  
25 agreements between OBB and Saarels, to record the Nonmerger  
26 Deed in Lieu of Foreclosure because Saarels did not comply  
27 with the terms of the [Second Agreement] or should title be  
28 quieted in Saarels because OBB improperly recorded the Deed  
in Lieu of Foreclosure?  
(c) Is the real property described in the Nonmerger Deed in Lieu  
of Foreclosure vested in fee simple title to OBB or is it  
property of the bankruptcy estate?

OBB and Saarels submitted briefs in support of their  
positions. Saarels argued that OBB's acceptance of a late payment

1 waived any default in connection with that payment. OBB asserted  
2 that the initial payment under the Second Agreement was not timely  
3 made, OBB never waived the March 5, 2008 deadline for that  
4 payment, Saarels did not pay the loan in full by August 5, 2008,  
5 and as a result, OBB was entitled to record the Nonmerger Deed in  
6 Lieu of Foreclosure and become the owner of the Property.

7 The bankruptcy court entered its Memorandum of Decision on  
8 September 15, 2009. The court first analyzed the Montana cases on  
9 waiver relied upon by Saarels and OBB. Applying that analysis to  
10 the stipulated facts, the bankruptcy court reached these  
11 conclusions:

12 - Saarels had not shown that OBB, expressly or by conduct,  
13 waived the March 5, 2008 payment deadline.

14 - There was no evidence in the record that either party  
15 intended to waive the March 5, 2008 deadline.

16 - Because Saarels failed to make the payment due on  
17 March 5, 2008, and then failed to pay off the loan in full by  
18 August 5, 2008, OBB was entitled, pursuant to the terms of the  
19 written agreements between OBB and Saarels, to record the  
20 Nonmerger Deed in Lieu of Foreclosure. When the deed was  
21 recorded, the Property vested in fee simple title in OBB.

22 The bankruptcy court entered a judgment in the adversary  
23 proceeding in favor of OBB on September 15, 2009. Saarels filed a  
24 timely appeal on September 25, 2009.

#### 25 26 **JURISDICTION**

27 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
28 and 157(b)(2)(A) and (O). We have jurisdiction under 28 U.S.C.  
§ 158.



1 Nat'l Union Fire Ins. Co., 94 F.3d 548 (9th Cir. 1996). The  
2 Montana Supreme Court instructs that a court should interpret the  
3 language of contractual provisions according to its plain,  
4 ordinary meaning. Ophus v. Fritz, 11 P.3d at 1196; Morning Star  
5 Enters. v. R.H. Grover, 805 P.2d 553, 557 (Mont. 1991). When the  
6 language of a contract is clear and unambiguous and, as a result,  
7 susceptible to only one interpretation, the duty of the court is  
8 to enforce the contract as written. Carelli v. Hall, 926 P.2d  
9 756, 761 (Mont. 1996).

10 Neither party to this dispute contests that the plain meaning  
11 of ¶ 1.1(d)(i) of the Second Agreement is that, if Saarels cured  
12 the delinquent payments "on or before March 5, 2008," OBB would  
13 return the Nonmerger Deed in Lieu to Saarels. In other words, in  
14 this context, the plain meaning of "on or before" a particular  
15 date is that OBB had a right to expect not only that Saarels would  
16 perform this term, but that such performance would be accomplished  
17 in a timely fashion on or before the March 5 deadline. Indeed,  
18 the parties stipulated that there was no ambiguity in this  
19 paragraph.

20 Saarels contend that their tardy payment is nonetheless  
21 effective, though, based on the doctrine of waiver. According to  
22 their interpretation of that doctrine, the mere fact that OBB  
23 accepted their cure payment on April 11, 2008, waived the  
24 March 5, 2008 deadline.

25 Saarels rely on two Montana Supreme Court decisions to  
26 support their argument. Neither compels reversal under these  
27 facts.

28

1           Saarels insist that Ahrens v. Cottle, 896 P.2d 1127 (Mont.  
2 1995) establishes the proposition that a party's acceptance of a  
3 late payment terminates that party's right to accelerate and  
4 terminate a contract for deed based upon late payment. However, a  
5 careful reading of Ahrens shows that its holding is, at best, of  
6 limited utility to Saarels.

7           In Ahrens, the contract buyers of a house agreed to make the  
8 monthly payments due on the sellers' mortgage to the bank. When  
9 the buyers became delinquent on bank payments, the sellers served  
10 them with a notice of the sellers' intent to terminate the  
11 parties' contract by posting it on the back door of the house,  
12 despite the contract's requirement for personal service or service  
13 by mail. The buyer then tendered the delinquent payments to the  
14 bank, which accepted those payments. 896 P.2d at 1129.

15           The court rejected the sellers' argument that a proper notice  
16 of default had been given by seller to the buyers. However, it  
17 also held that, under the facts, the bank's acceptance of the late  
18 payments waived the contract requirement that buyers make those  
19 payments in a timely fashion:

20                   [It is irrelevant that the [buyer's]  
21 delinquent payments were accepted and retained  
22 by [the bank] rather than [the sellers]. What  
23 is relevant is the fact that [the buyer] had  
24 not been served with notice of default, he  
25 made payments to [the bank] in satisfaction of  
26 the underlying obligation, and those payments  
27 were accepted and retained. Any defaults that  
28 may have occurred were cured when [the buyer]  
brought all payments current.

896 P.2d at 1130.

As can be seen, the Montana court's decision in Ahrens that  
the sellers had waived timely payments was based upon its

1 conclusion that the sellers had not given the buyers proper notice  
2 of default. In this case, Saarels have not argued that they were  
3 given inadequate notice of their default. Ahrens therefore does  
4 not require that the bankruptcy court's decision be reversed.

5 Saarels also rely on Boles v. Ler, 719 P.2d 793 (Mont. 1986).  
6 In Boles, a seller sent borrower a notice of his intention to  
7 cancel a contract for deed, but then continued to accept several  
8 monthly payments after sending the notice. The Montana Supreme  
9 Court ruled that the seller's acceptance of the payments waived  
10 the seller's right to terminate the contract.

11 Again, the facts in Boles are clearly distinguishable from  
12 those in this appeal, because here no notice of default was sent  
13 to Saarels before they made the tardy payment, and, as discussed  
14 below, the Montana Supreme Court finds a continuing course of  
15 conduct, such as accepting several payments, more indicative of an  
16 "unequivocal manner" of a course of conduct. Here, Saarels rely  
17 upon OBB's acceptance of a single late payment to demonstrate a  
18 waiver.

19 The bankruptcy court correctly applied the Montana law of  
20 waiver. Waiver is the "voluntary and intentional relinquishment  
21 of a known right, claim or privilege." Thiel v. Johnson, 711 P.2d  
22 829, 831 (Mont. 1985) (quoting 28 AM. JUR.2d § 197); Trustees of  
23 the Wash.-Idaho-Mont. Carpenters Retirement Trust Fund, et al. v.  
24 Galleria P'ship, 780 P.2d 608, 613 (Mont. 1989). According to  
25 Thiel, waiver may be proved by express declarations or by a course  
26 of acts and conduct so as to induce the belief that the intention  
27 and purpose was to waive. 711 P.2d at 831.

28

1 In this case, the parties stipulated that OBB never  
2 expressed or declared its intent that the March 5, 2008 deadline  
3 for Saarels to cure the defaults for the period of  
4 November 5, 2007 through March 5, 2008 was waived. We agree with  
5 the bankruptcy court that, based on this record and the  
6 stipulation of the parties, there was no express declaration of  
7 waiver by OBB. As a result, as the bankruptcy court observed,  
8 "Saarel[s] must show that OBB, either through its acts or conduct,  
9 waived the March 5, 2008, deadline."

10 To support an implied waiver, the actor's conduct must be  
11 manifested in some "unequivocal manner." Thiel, 711 P.2d at 832.  
12 Concerning this requirement, in addition to Boles, the Montana  
13 Supreme Court has three times indicated that an unequivocal waiver  
14 is demonstrated by a "course of acts and conduct" or, in other  
15 words, not isolated incidents. Collection Bureau Servs. v.  
16 Morrow, 87 P.3d 1024, 1028-29 (Mont. 2004) (collection agency that  
17 accepted over a period of time several partial payments after  
18 making a demand for full payment waived its right to sue for  
19 statutory damages); VanDyke Constr. Co. v. Stillwater Mining Co.,  
20 78 P.3d 844, 847 (Mont. 2003) (finding that plaintiff sent five  
21 letters over a four-month period that supported arbitration, and  
22 deeming that a waiver of plaintiff's right to subsequently object  
23 to contract provisions requiring arbitration); Sperry v. Montana  
24 St. Univ., 778 P.2d 895, 898 (Mont. 1989) (university professor  
25 who continued to cash checks over a 19-year period waived right to  
26 contest dispute over pay).

27 In finding that there was no course of behavior, acts, or  
28 conduct by OBB unequivocally demonstrating an intent to waive

1 timely payment of the March 5 deadline, the bankruptcy court  
2 observed:

3 If Saarel brought the loan current by March 5, 2008,  
4 including the March 5, 2008, installment, OBB was to  
5 return the Nonmerger Deed in Lieu of Foreclosure to  
6 Saarel within 7 days of full payment of the amount to  
7 cure. Had the parties intended a waiver of the  
8 March 5, 2008, deadline, OBB would have returned the  
9 Nonmerger Deed in Lieu of Foreclosure or Saarel would  
10 have requested that the Nonmerger Deed in Lieu of  
11 Foreclosure be returned. When Saarel made the tardy  
12 payment of \$40,132.88 on April 8, 2008, OBB did not  
13 return, and Saarel did not request the return of, the  
14 Nonmerger Deed in Lieu of Foreclosure. Accordingly,  
15 the Court concludes that OBB did not waive the  
16 March 5, 2008 deadline. . . .

17 The [Second Agreement] specifically provides that if  
18 Saarel did not timely cure the entire outstanding  
19 default by March 5, 2008, Saarel could still prevent  
20 losing the land by paying the contract balance in full  
21 by August 5, 2008. Indeed, it was not unreasonable for  
22 OBB to accept the April 8, 2008, payment with the  
23 assumption that Saarel would pay off the loan in its  
24 entirety by August 5, 2008. This belief is reflected in  
25 the June 28, 2008, emails between [OBB] and Saarel  
26 wherein Jim Shires, on behalf of OBB, stated that OBB  
27 did not want to record a deed against Saarel's property,  
28 but that time was running out. The time that was  
running out was Saarel's time to payoff the loan by  
August 5, 2008, given Saarel's failure to timely make  
the March 5, 2008, payment. In sum, no evidence exists  
in the record to show that either OBB or Saarel intended  
to waive the March 5, 2008 deadline in the [Second  
Agreement].

Memorandum of Decision at 13-14.

We find no error in the bankruptcy court's analysis of the  
facts. The bankruptcy court correctly held that Saarels did not  
show that OBB waived the March 5, 2008 payment deadline, and we  
agree with the court's interpretation of the plain meaning of the  
terms of the Second Agreement that "because Saarel[s] failed to  
make the payment due March 5, 2008, and then failed to pay off the  
loan in full by August 5, 2008, OBB was entitled, pursuant to the  
terms of the written agreements between OBB and Saarels, to record

1 the Nonmerger Deed in Lieu of Foreclosure." Memorandum of  
2 Decision at 14.

3 Although not specifically discussed by the bankruptcy court,  
4 we believe there are other provisions of the Second Agreement  
5 which reinforce the foundation for the bankruptcy court's  
6 interpretation. In particular, the Second Agreement provides:

7 SECTION 2. NO OTHER MODIFICATION. Except as expressly  
8 provided in this Agreement, all other provisions of the  
9 Loan Documents previously executed by the parties in  
connection with the Loan shall remain in full force and  
effect.

10 SECTION 3. WAIVER. The failure of any party at any  
11 time to require performance of any provision of this  
12 Agreement shall not limit that party's right to enforce  
13 the provision, nor shall any waiver of any breach of any  
14 provision constitute a waiver of any succeeding breach  
15 of that provision or a waiver of that provision itself.

16 The "Loan Documents" referred to in Section 2 of the Second  
17 Agreement include the mortgage securing OBB's loan to Saarels.  
18 The mortgage provides, in part, that "[a]ny forbearance by  
19 mortgagee in exercising any right or remedy hereunder, or  
20 otherwise afforded by applicable law, shall not be a waiver of, or  
21 preclude the exercise of any such right or remedy." Mortgage ¶ 9.

22 The Montana court, in the Galleria P'ship decision cited  
23 above, had an occasion to examine the impact of similar contract  
24 provisions concerning waiver in this setting. Addressing an  
25 argument that a lender's "customary acceptance of late payments"  
26 over several years constituted a waiver of a contract requiring  
27 timely payments, the court responded by pointing to the parties'  
28 contract containing nonwaiver provisions very similar to those  
involved here. In light of these provisions, the Galleria court  
held:

1 While we can conceive of cases in which the nonwaiver  
2 provisions of a contract should not be applied, the  
3 facts here do not warrant such a result. Not only must  
4 the evidence show a course of conduct by which one party  
5 waived the contractual obligations of the other party,  
6 but additionally, it seems to us, the evidence should  
7 show that the same party also waived any right to rely  
8 on the nonwaiver provisions of his contract. In other  
9 words, in this instance, since a waiver is a known and  
10 voluntary relinquishment of a known right, those  
11 elements of waiver at least have to appear from the  
12 evidence before it can be held that the contractual  
13 right of nonwaiver has been waived.

14 780 P.2d at 614.

15 The impact of Galleria P'ship in this case is significant. It  
16 would require that Saarels show not only that OBB's acceptance of  
17 the April cure payment waived the requirement in the Second  
18 Agreement that the payment be made by March 5, but also that  
19 Saarels demonstrate that OBB intended to waive the nonwaiver  
20 provisions of the mortgage or Second Agreement. Our review of the  
21 record and stipulated facts shows no persuasive evidence of such a  
22 waiver.

#### 23 CONCLUSION

24 We AFFIRM the judgment of the bankruptcy court.  
25  
26  
27  
28