

OCT 05 2011

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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NOT FOR PUBLICATION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

In re:)	BAP No. CC-10-1512-DPaKi
)	
MAGDA ANGELA ESLABON CATIPON,)	Bk. No. 09-24437
)	
Debtor.)	Adv. No. 09-02084
)	
_____)	
UNION BANK OF CALIFORNIA, N.A.,)	
)	
Appellant,)	
)	
v.)	
)	
MAGDA ANGELA ESLABON CATIPON,)	M E M O R A N D U M ¹
)	
Appellee.)	
)	
_____)	

Argued and Submitted on September 23, 2011
at Pasadena, California

Filed - October 5, 2011

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

Honorable Vincent P. Zurzolo,² Bankruptcy Judge, Presiding

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 The order from which this appeal was taken was signed by Judge Zurzolo. However, the text of the order recites that Hon. Samuel L. Bufford was the presiding judge at the evidentiary hearing upon which the order is based.

1 Appearances: Jennifer Witherell Crastz, Esq. of Hemar, Rousso &
2 Heald, LLP appeared for Appellant but did not argue.
3 No appearance for Appellee.

4 Before: DUNN, PAPPAS, and KIRSCHER, Bankruptcy Judges.

5 The bankruptcy court dismissed a creditor's § 523(a)(2)(A)³
6 adversary proceeding on the basis that no debt existed under
7 California law. We AFFIRM.

8 I. FACTS

9
10 When Magda Angela Eslabon Catipon ("Ms. Catipon") filed her
11 chapter 7 petition on June 9, 2009, she scheduled debts ("Vehicle
12 Debts") incurred between April 15, 2008 and July 3, 2008, related to
13 the purchase of sixteen used luxury automobiles ("Luxury Vehicles").
14 She also scheduled, both as a secured claim and as an executory
15 contract, a debt incurred December 30, 2004 for her personal
16 vehicle. She did not include any of the Vehicle Debts on Schedule G
17 as executory contracts or subject to unexpired leases.

18 Ms. Catipon's Statement of Financial Affairs reflects 2008
19 gross income in the amount of \$53,695.00. Her Schedule I reflects
20 gross monthly income in the amount of \$4,128.95, with net monthly
21 take home pay in the amount of \$3,264.79. She had been employed by
22 her current employer for seven years.

23
24 ³ Unless otherwise specified, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure
are referred to as "Civil Rules."

1 Union Bank of California, N.A. ("Union Bank") financed
2 Ms. Catipon's purchase of two of the Luxury Vehicles: a 2005
3 Infiniti G35 ("Infiniti") on May 8, 2008, and a 2005 Land Rover
4 ("Land Rover") on July 3, 2008. By the time she filed her
5 bankruptcy case, Ms. Catipon had defaulted on both of the loans from
6 Union Bank. On the Petition Date, Ms. Catipon owed Union Bank
7 \$26,106 for the Infiniti loan, and \$33,013 for the Land Rover loan.

8 Union Bank's counsel attended the § 341(a) Meeting of Creditors
9 in Ms. Catipon's bankruptcy case in an effort to obtain information
10 about the locations of the Infiniti and the Land Rover. Ms. Catipon
11 testified that the Land Rover was in the possession of Lashonda
12 Hubbard, whom Ms. Catipon described as a friend.

13 Ms. Catipon further testified at the § 341(a) Meeting of
14 Creditors that she purchased the cars for friends and relatives who
15 had bad credit. All of the Luxury Vehicles were purchased from
16 Richard Unite, the owner of Unite Cars in San Pedro, California.
17 Both the chapter 7 trustee and Union Bank's counsel questioned
18 Ms. Catipon generally about how she was able to finance the Luxury
19 Vehicles where her annual salary was approximately \$50,000.
20 Ms. Catipon testified that she was truthful in the loan applications
21 she made in obtaining the financing for the Luxury Vehicles, that
22 she listed on the loan applications all of the previously financed
23 Luxury Vehicles, and that she (apparently in some instances)
24 provided a copy of her pay stub. In response to a rhetorical
25 question by the trustee about why the banks would approve her loans
26 for the Luxury Vehicles, Ms. Catipon responded: "That's also my

1 question. I don't know why they approve[d] me."

2 During the course of the bankruptcy case, Union Bank recovered
3 the Infiniti and the Land Rover, and foreclosed its security
4 interest in each of the vehicles through a private auction. Union
5 Bank filed a timely complaint pursuant to § 523(a)(2)(A), seeking to
6 except from Ms. Catipon's discharge the debt which remained after
7 the foreclosures ("deficiency"). The total deficiency asserted by
8 Union Bank was \$27,751.03, plus interest and late charges. In its
9 complaint, Union Bank asserted that Ms. Catipon had engaged in a
10 scheme with Richard Unite, whereby they would "alter certain credit
11 information" so that Union Bank and others would be induced to
12 extend credit to Ms. Catipon.

13 When Ms. Catipon failed to file an answer to Union Bank's
14 complaint, default was entered against her by the Clerk of the
15 Court. The bankruptcy court conducted a "trial" ("Trial") on the
16 adversary complaint on March 11, 2010.⁴

17 As relevant to our analysis in this appeal, Union Bank's third
18 witness at the Trial was its litigation adjustment officer, Jody
19 Curry, who was responsible, inter alia, for sending defaulted loan
20 accounts to outside counsel for litigation, and managing those loan
21 accounts until the conclusion of the collection process. Ms. Curry

22

23 ⁴ The Trial was in fact a "prove up" hearing for purposes of
24 entering a default judgment as contemplated by Civil Rule 55(b)(2),
25 which authorized the bankruptcy court to "conduct hearings . . .
26 when, to enter . . . judgment, it needs to . . . (C) establish the
truth of any allegation by evidence; or (D) investigate any other
matter."

1 testified that Union Bank had recovered possession of both the
2 Infiniti and the Land Rover from persons other than Ms. Catipon, and
3 that both vehicles had been sold through private auctions.
4 Ms. Curry testified as to the auction sales prices, the net proceeds
5 from the auction, and the deficiencies remaining on the Infiniti
6 loan and the Land Rover loan.

7 The bankruptcy court admitted Exhibits 9 and 17 into evidence
8 for the purpose of determining whether the notices sent by Union
9 Bank to Ms. Catipon were sufficient to create a deficiency under
10 state law. Exhibit 9 was the Notice of Intent to Dispose of a
11 Repossessed or Surrendered Vehicle served on Ms. Catipon by Union
12 Bank with respect to the Infiniti. Exhibit 17 was the Notice of
13 Intent to Dispose of a Repossessed or Surrendered Vehicle served on
14 Ms. Catipon by Union Bank with respect to the Land Rover.

15 At the conclusion of the Trial, the bankruptcy court found
16 that, under California law, no debt existed after Union Bank
17 foreclosed its security interest in the Infiniti and the Land Rover
18 because (1) a private party auction is not a commercially reasonable
19 disposition of collateral and (2) the notices provided to
20 Ms. Catipon were not sufficient.⁵ After an unexplained delay of
21 nine months, the bankruptcy court entered its order dismissing the
22

23 ⁵ The bankruptcy court found that even if Union Bank had
24 shown Ms. Catipon owed it a debt, there was no evidence in the
25 record that Ms. Catipon made a representation to Union Bank that was
26 false and upon which Union Bank detrimentally relied to its damage.
In short, the bankruptcy court determined that Union Bank had failed
to prove that any debt it was owed was incurred by fraud.

1 adversary proceeding. Union Bank timely filed its Notice of Appeal.

2
3 II. JURISDICTION

4 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
5 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

6
7 III. ISSUES⁶

8 Whether the bankruptcy court erred when it determined that
9 Union Bank did not hold an enforceable debt for purposes of
10 § 523(a)(2)(A).

11
12 IV. STANDARDS OF REVIEW

13 We review a bankruptcy court's interpretation of state law de
14 novo. State Bd. of Equalization v. Leal (In re Leal), 366 B.R. 77,

15
16 ⁶ Other issues asserted by Union Bank on appeal include:

17 Whether the bankruptcy court abused its discretion when it
18 refused to admit into evidence:

- 19 a. Ms. Catipon's testimony from the Meeting of
20 Creditors,
21 b. Ms. Catipon's bankruptcy schedules and Statement
of Financial Affairs, and
22 c. computerized records offered by the Bank; and

23 Whether the bankruptcy court erred when it determined that
24 Union Bank did not provide sufficient evidence that any
debt Ms. Catipon might owe to Union Bank was incurred by
fraud.

25 Because the bankruptcy court correctly determined that Union Bank
26 held no right to collect a deficiency following the sales of its
collateral, we express no opinion on these issues.

1 80 (9th Cir. BAP 2007). De novo review requires that we consider a
2 matter anew, as if it had not been heard before, and as if no
3 decision had been rendered previously. United States v. Silverman,
4 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee (In re
5 Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

6
7 V. DISCUSSION

8 A chapter 7 discharge will not discharge an individual debtor
9 from any "debt"

10 for money, property, services, or an extension, renewal,
11 or refinancing of credit, to the extent obtained by --

12 (A) false pretenses, a false representation, or
13 actual fraud, other than a statement respecting the
14 debtor's or an insider's financial condition

15

16 Section 523(a)(2)(A). The elements for establishing that a debt is
17 nondischargeable under § 523(a)(2)(A) are well established by Ninth
18 Circuit authority.

19 The Ninth Circuit employs a five-part test for determining
20 when a debt is non-dischargeable under § 523(a)(2)(A). The
21 creditor must show: (1) that the debtor made the
22 representations; (2) that the debtor knew they were false;
23 (3) that the debtor made them with the intention and
24 purpose of deceiving the creditor; (4) that the creditor
25 relied on the statements; (5) that creditor sustained
26 damages as the proximate result of the representations.
In re Britton, 950 F.2d 602, 604 (9th Cir. 1991).

Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 n.2 (9th
Cir. 1997). Union Bank bore the burden of proving, by a
preponderance of the evidence, each of the elements of its
claim for relief under § 523(a)(2)(A). Grogan v. Garner,
498 U.S. 279, 291 (1991).

1 In the absence of an enforceable obligation, however,
2 there is no "debt" that can be held nondischargeable. Mandalay
3 Resort Grp. v. Miller (In re Miller), 292 B.R. 409, 412 (9th
4 Cir. BAP 2003). The bankruptcy court ruled that Union Bank
5 held no valid debt that could be subject to a
6 nondischargeability judgment under § 523(a)(2)(A).
7 Specifically, the bankruptcy court determined that under
8 California Law, Union Bank had no right to enforce any
9 deficiency from its sales of the Infiniti and the Land Rover.

10 Cal. Civ. Code § 2983.2(a) provides in relevant part:

11 [A]ny provision in any conditional sale contract for
12 the sale of a motor vehicle to the contrary
13 notwithstanding, at least 15 days' written notice of
14 intent to dispose of a repossessed or surrendered
15 motor vehicle shall be given to all persons liable on
16 the contract. The notice shall be personally served
17 or shall be sent by certified mail, return receipt
18 requested, or first-class mail, postage prepaid,
19 directed to the last known address of the persons
20 liable on the contract. . . . Except as otherwise
21 provided in Section 2983.8, those persons shall be
22 **liable for any deficiency** after disposition of the
23 repossessed or surrendered motor vehicle **only if** the
24 **notice** prescribed by this section **is given within 60**
25 **days of repossession or surrender and does all of the**
26 **following:**

(1) Sets forth that those persons shall have a right
to redeem the motor vehicle by paying in full the
indebtedness evidenced by the contract until the
expiration of 15 days from the date of giving or
mailing the notice and provides an itemization of the
contract balance and of any delinquency, collection
or repossession costs and fees and sets forth the
computation or estimate of the amount of any credit
for unearned finance charges or canceled insurance as
of the date of the notice.

(2) States either that there is a conditional right
to reinstate the contract until the expiration of 15
days from the date of giving or mailing the notice

1 and all the conditions precedent thereto or that
2 there is no right of reinstatement and provides a
statement of reasons therefor.

3 (3) States that, upon written request, the seller or
4 holder shall extend for an additional 10 days the
redemption period or, if entitled to the conditional
5 right of reinstatement, both the redemption and
6 reinstatement periods. The seller or holder shall
provide the proper form for applying for the
7 extensions with the substance of the form being
limited to the extension request, spaces for the
8 requesting party to sign and date the form, and
instructions that it must be personally served or
9 sent by certified or registered mail, return receipt
10 requested, to a person or office and address
designated by the seller or holder and received
before the expiration of the initial redemption and
reinstatement periods.

11 (4) Discloses the place at which the motor vehicle
12 will be returned to those persons upon redemption or
reinstatement.

13 (5) Designates the name and address of the person or
14 office to whom payment shall be made.

15 (6) States the seller's or holder's intent to dispose
of the motor vehicle upon the expiration of 15 days
16 from the date of giving or mailing the notice, or if
by mail and either the place of deposit in the mail
17 or the place of address is outside of this state, the
period shall be 20 days instead of 15 days, and
18 further, that upon written request to extend the
redemption period and any applicable reinstatement
19 period for 10 days, the seller or holder shall
without further notice extend the period accordingly.

20 (7) Informs those persons that upon written request,
21 the seller or holder will furnish a written
accounting regarding the disposition of the motor
22 vehicle as provided for in subdivision (b). The
seller or holder shall advise them that this request
23 must be personally served or sent first-class mail,
postage prepaid, or certified mail, return receipt
24 requested, to a person or office and address
designated by the seller or holder.

25 (8) Includes notice, in at least 10-point bold type
26 if the notice is printed, reading as follows:
"NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF

1 THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE
2 IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY
OTHER AMOUNTS DUE."

3 (9) Informs those persons that upon the disposition
4 of the motor vehicle, they will be liable for the
5 deficiency balance plus interest at the contract
6 rate, or at the legal rate of interest pursuant to
Section 3289 if there is no contract rate of
interest, from the date of disposition of the motor
vehicle to the date of entry of judgment.

7 (emphasis added).

8 Because our review is de novo, we review Union Bank's
9 "Notice of Intent to Dispose of a Repossessed or Surrendered
10 Vehicle" ("Notice") to determine whether Ms. Catipon is liable
11 to Union Bank for any deficiency following its disposition of
12 the Infiniti and the Land Rover. We conclude that the Notice
13 did not comply with the provisions of Cal. Civ. Code
14 § 2983.2(a) in a number of ways.

15 For instance, it did not inform Ms. Catipon that she had
16 15 days from the date of the Notice to redeem the vehicle as
17 required by Cal. Civ. Code § 2983.2(a)(1), or that Union Bank
18 intended to dispose of the vehicle upon the expiration of 15
19 days from the mailing date of the Notice as required by Cal.
20 Civ. Code § 2983.2(a)(6). Instead, Union Bank's Notice stated:
21 "The debtor[] . . . may redeem the collateral before
22 sale . . ." and "Redemption payment must be made before sale
23 . . ." No sale date was included in either the Infiniti
24 Notice or the Land Rover Notice. Thus, neither Notice served
25 to inform Ms. Catipon of her need to act to redeem within any
26 specified or referenced time period.

1 The Notice stated that "[i]n the absence of redemption or,
2 if available, reinstatement, [Union Bank] will dispose of the
3 collateral in the manner provided for in the 'Notice of Our
4 Plan to Sell Property' that accompanies this [Notice]." We
5 note first that no "Notice of Our Plan to Sell Property" was in
6 the record for our review; neither did Union Bank offer it as
7 evidence in the adversary proceeding. Second, this language
8 was not sufficient to inform Ms. Catipon whether a right of
9 reinstatement existed as required by Cal. Civ. Code
10 § 2983.2(a)(2) and (6).

11 Further, the Notice did not describe the process for
12 requesting an extension of the redemption or any reinstatement
13 period as required by Cal. Civ. Code § 2983.2(a)(3). Nor did
14 the Notice advise Ms. Catipon how she could obtain an
15 accounting after the sale of the vehicle as provided by Cal.
16 Civ. Code § 2983.2(a)(7). Finally,⁷ the Notice did not advise
17 Ms. Catipon of the extent of the liability that would remain
18 after the disposition of the vehicle as required by Cal. Civ.
19 Code § 2983.2(a)(9).

20 In light of Union Bank's failure to provide appropriate
21 notice of its proposed disposition of the vehicles as required
22 by Cal. Civ. Code § 2983.2(a), Union Bank is not entitled to a
23

24 ⁷ The use of the word "finally" here does not suggest that
25 we are providing a complete catalog of the deficiencies of the
26 Notice. Rather, it is meant to signal that we will not continue in
our identification of statutory defects in the Notice.

1 deficiency by the express language of the statute. See, e.g.,
2 Bank of America v. Lallana, 19 Cal.4th 203, 210, 77 Cal.Rptr.2d
3 910, 915 (Cal. 1998):

4 Accordingly, we hold that to obtain a deficiency
5 judgment, a secured creditor who sells a defaulting
6 debtor's repossessed car must do so in a manner that
7 complies not only with all the provisions of the
8 [Rees-Levering Motor Vehicle Sales and Finance Act,
9 Cal. Civ. Code § 2981 et seq], but also with any
10 relevant provisions in division 9 of the California
11 Uniform Commercial Code.

12 (emphasis added).

13 Union Bank asserts on appeal that the bankruptcy court
14 abused its discretion when it raised, sua sponte, the issue of
15 whether the Notice was adequate to impose liability on
16 Ms. Catipon for the deficiency. Union Bank characterizes the
17 bankruptcy court's inquiry into the adequacy of the Notice as
18 inappropriately raising an affirmative defense for Ms. Catipon.
19 Union Bank also complains that it had insufficient notice that
20 the adequacy of the Notice would be at issue. Union Bank
21 asserts that because the bankruptcy court raised the issue only
22 after Union Bank had presented its case, Union Bank was
23 precluded from presenting evidence about other "notifications"
24 it might have made.

25 We disagree. The Notice was facially defective in a
26 number of respects. Union Bank had the burden of proving, at
the time of the Trial, that it held a "debt" that Ms. Catipon
could not discharge. In evaluating the adequacy of the Notice,
the bankruptcy court did nothing more than rule on Union Bank's

1 assertion that it held a debt, based upon a deficiency, that
2 should be excepted from discharge.

3 We observe that the bankruptcy court was required to
4 construe exceptions to the discharge of Ms. Catipon's debts
5 strictly against Union Bank and liberally in favor of
6 Ms. Catipon. Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154
7 (9th Cir. 1992). The application of this imperative required
8 the bankruptcy court to find that a debt in fact existed,
9 rather than deem the debt admitted as suggested by Union Bank.

10 In a case with allegations of a debtor's fraud it may seem
11 harsh to enforce a creditor's strict compliance with a notice
12 statute designed to protect that debtor's rights. However,
13 Cal. Civ. Code § 2983.2 provides no exceptions to compliance in
14 cases involving alleged or actual fraud by the debtor. By
15 comparison, Cal. Civ. Code § 2983.3 authorizes a creditor to
16 deny a right to reinstatement, if the creditor has a good faith
17 belief that, inter alia, any person "liable on the contract by
18 omission or commission intentionally provided false or
19 misleading information of material importance on his or her
20 credit application."

21 We are required to apply California law as written by the
22 California legislature and as interpreted by the California
23 courts. On its face, the Notice did not comply with Cal. Civ.
24 Code § 2983. As a consequence, Union Bank has no right to

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26 ///

1 assert a deficiency claim against Ms. Catipon.⁸

2 Because Union Bank holds no enforceable debt against
3 Ms. Catipon, the bankruptcy court did not err when it dismissed
4 the adversary proceeding.

5

6

VI. CONCLUSION

7 Union Bank did not comply with the notice requirements of
8 Cal. Civ. Code § 2983.2 in selling the Infiniti and the Land
9 Rover. As a consequence, Union Bank was not entitled to a
10 deficiency enforceable against Ms. Catipon. The bankruptcy
11 court appropriately dismissed Union Bank's adversary proceeding
12 which sought a determination that the deficiency was
13 nondischargeable pursuant to § 523(a)(2)(A).

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We AFFIRM.

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⁸ We need not reach the bankruptcy court's alternative
25 holding that Cal. Civ. Code § 2983.8 precluded Union Bank from the
26 right to a deficiency because a private auction was not a
commercially reasonable disposition of the vehicles.