NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NV-10-1505-JuHKw
	BAP No. NV-11-1011-JuKKw
DEBORAH DUMLAO,	(Consolidated Appeals)
	BAP No. NV-11-1030-JuHKw
Debtor.	(Cross-Appeals)
FRONTIER FINANCIAL CREDIT UNION,	Bk. No. 09-50815
	Adv. No. 10-5041
Appellant,	
v.	M E M O R A N D U M*
DEBORAH DUMLAO,	
Appellee/Cross-Appellant	

Argued and Submitted on July 21, 2011
at Las Vegas

Filed - August 5, 2011

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

Honorable John L. Peterson, Bankruptcy Judge, Presiding

Appearances: Christopher P. Burke, Esq. argued for Appellant Frontier Financial Credit Union; and Patricia Wilson Hadfield, Esq. argued for Appellee and Cross-Appellant Deborah Dumlao.

Before: JURY, HOLLOWELL, and KWAN[1], Bankruptcy Judges.

* 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.

[1] Hon. Robert N. Kwan, Bankruptcy Judge for the Central District of California, sitting by designation.

This appeal involves the enforceability of a cross collateral clause contained in a security agreement that was signed prepetition by chapter 7[2] debtor Deborah Dumlao.

In a Memorandum Decision and Order, the bankruptcy court granted summary judgment for debtor, finding that appellant, Frontier Financial Credit Union ("FFCU"), violated the § 524 discharge injunction because its asserted lien against debtor's car for her Visa credit card debt was unenforceable. After a separate hearing on debtor's motion for attorney's fees and damages, the court entered a Final Memorandum Of Decision And Order For Judgment which incorporated its previous findings, awarded debtor attorney's fees of $9340 plus costs of $250, and denied her request for damages.

FFCU appeals the bankruptcy court's judgment, arguing that the court erred by (1) granting summary judgment for debtor because she never filed a motion for summary judgment; (2) denying FFCU's motion to dismiss or, in the alterative, for summary judgment because the cross collateral clause was valid and enforceable under Nevada's Uniform Commercial Code ("U.C.C."); and (3) awarding debtor attorney's fees and costs for its alleged violation of the discharge injunction. Debtor cross appeals on the portion of the judgment denying her damages.

For the reasons stated, we REVERSE the bankruptcy court's

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. "Rule" references are to the Federal Rules of Bankruptcy Procedure and "Civil Rule" references are to the Federal Rules of Civil Procedure.

decision granting summary judgment for debtor and REMAND the case to the bankruptcy court for further proceedings consistent with this disposition.

I. FACTS

Debtor had a credit relationship with FFCU since 2002.

On February 7, 2002, debtor obtained a Visa card from FFCU. Paragraph 8 of the Visa Classic Silver Credit Card Agreement provided that the Visa card debt was secured by debtor's shares in an individual or joint account. It also stated that "[c]ollateral securing other loans you have with the Credit Union may also secure this loan . . . ." Debtor had no other loans with FFCU at that time.

On February 3, 2005, debtor and her husband applied for, and obtained, a signature (unsecured) loan for $6,000 through FFCU's Loanliner program. Under the Loanliner program, the member signs a credit agreement. Once the credit agreement has been executed, the member may apply for extensions of credit under the Loanliner Plan (the "Plan"). The Plan provides for the advancement of monies through various subaccounts. When an advance is made, it is memorialized in a document called an advance request voucher. A subaccount advance can be unsecured (signature loan) or secured.

Paragraph 6 of the credit agreement, which was initialed by debtor and her husband, provided:

> Additional security for the Plan may be required at the time of an advance. If a subaccount identifies a type of property (such as "New Cars") you must give that type of property as security when you get an advance under the subaccount. A subaccount name such as "Other Secured" means you must provide security acceptable to us when you obtain an advance under that

> subaccount. Property you give as security will secure all amounts owed under the Plan and all other loans you have with us now or in the Future, except any loan secured by your principal dwelling. Property securing other loans you have with us may also secure the Plan.

On October 16, 2006, debtor and her husband borrowed $16,285 from FFCU under the Loanliner program to refinance a 2002 Acura RSX Sport vehicle (the "Acura"). In conjunction with the loan, they executed a Loanliner Open-End Voucher and Security Agreement. Under the heading of "Security Offered," the advance loan voucher stated: "[t]he advance is secured by your shares, all property securing other Plan advances and loans received in the past or in the future, and the following property: Acura RSX S Sport, 2002 . . . ." The voucher further provided below the "Signatures" heading: "[b]y signing below . . . you agree . . . [t]o make and be bound by the terms of this Security Agreement including the cross collateral clause."

Paragraph 2 of the attached Security Agreement provided:

> What the Security Interest Covers - The security interest secures the advance and any extensions renewals or refinancings of the advance. It also secures any other advances you have now or receive in the future under the Plan and any other amounts or loans, including any credit card loan, you owe us for any reason now or in the future except any loan secured by your principal residence.

On March 25, 2009, debtor filed her chapter 7 bankruptcy petition. In Schedule D, debtor listed FFCU as a creditor owed $10,816 secured by the Acura. In Schedule F, debtor listed FFCU as an unsecured creditor for the $2562 balance owing on her Visa card. FFCU had notice of debtor's bankruptcy, but did not participate in the proceedings. On July 8, 2009, debtor received her discharge and a final decree was entered

December 10, 2009.

On February 1, 2010, debtor paid off the loan on her Acura in full and made a demand on FFCU to transfer title. FFCU refused, asserting that the cross collateral clause in the Security Agreement provided that the Acura secured all debt owed to FFCU, including amounts owed on her Visa card. In a March 10, 2010 letter to debtor's attorney, FFCU stated that unless debtor arranged to make payments on her Visa card, FFCU would repossess her car. The letter further stated that FFCU was not seeking to collect a debt against debtor personally.

On June 11, 2010, the court granted debtor's motion to reopen her bankruptcy case.

On June 17, 2010, debtor filed an adversary complaint against FFCU, alleging that her credit card debt was unsecured and discharged in her bankruptcy. Debtor's complaint was not the model of clarity. She styled her complaint as stating a claim for relief under § 523(c). In other words, she alleged that her credit card debt was discharged because FFCU did not object to the dischargeability of the debt under § 523(a)(2), (4), or (6). The complaint referenced the discharge injunction under the Fourth Cause of Action. In her prayer for relief debtor requested (1) declaratory relief determining that the Visa card debt was discharged; (2) an injunction prohibiting FFCU from pursuing any further efforts to collect the credit card debt; (3) a writ of mandate compelling FFCU to immediately transfer clear title of the Acura to debtor; (4) damages for the loss of use of the Acura beginning April 1, 2010, and continuing until such time the court issued the injunction; and (5) an

award of attorney's fees and costs.

Recognizing that the central issue was whether FFCU's lien on debtor's Acura also secured her credit card debt, i.e., the validity of the cross collateral clause, FFCU moved to dismiss debtor's complaint or, in the alternative, for summary judgment on July 20, 2010. FFCU argued that the cross collateral clause in the Security Agreement was valid under Nevada Revised Statute ("NRS") 104.9204 so long as the obligations secured by the collateral were within the intent of the parties' agreement. FFCU asserted that the clause was clear and unambiguous and, therefore, valid and enforceable against debtor as a matter of law.

Debtor opposed FFCU's motion, arguing that the cross collateral clause was invalid as to consumer goods (her car) and that Nevada's U.C.C. imposed an obligation of good faith, which FFCU breached.[3] In her opposition, debtor asked the court to deny FFCU's motions or enter judgment for her on the pleadings. She did not file a separate motion requesting judgment on the pleadings under Civil Rule 12(c).[4]

Debtor also asserted in a separate statement of undisputed

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[3] Debtor raised the good faith issue in her opposition to FFCU's motion for summary judgment and again at the hearing. Debtor cited NRS 104.1304 which provides: "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." NRS 104.1201(t) states that "[g]ood faith means honesty in fact and the observance of reasonable commercial standards of fair dealing." The bankruptcy court did not address the issue of FFCU's good faith in either of its rulings.

[4] Civil Rule 12(c), incorporated by Rule 7012, states: "After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings."

facts, among other things, that (1) when she applied for her Visa card, FFCU did not inform her that if she were to finance an automobile through FFCU that it would become security for charges made on her Visa card; (2) her signature loan agreement mentioned only her and her husband's deposit/share accounts as security, but did not mention credit card debt; and (3) no one from FFCU asked her or her husband to initial any portion of the car loan Security Agreement nor did anyone tell them that the Acura might be used as security for payment of credit card obligations.

On November 3, 2010, the bankruptcy court heard FFCU's motion and took the matter under submission. On November 30, 2010, the court entered its Memorandum Decision and Order granting summary judgment for debtor,[5] finding that the cross collateral clause was unenforceable as a matter of law. The bankruptcy court's few factual findings make it unclear whether the court properly applied the law. The court simply stated that it refused to enforce adhesion agreements and their dragnet clauses, but it offered no reasoning for its conclusion. Moreover, the court construed the credit agreement and later Security Agreement as ambiguous because they did not clearly reference the 2002 Visa Classic Silver Credit Card Agreement. As a result of these conclusions, the court found that debtor's

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[5] We presume the bankruptcy court treated debtor's request for judgment on the pleadings as one for summary judgment under Civil Rule 12(d) which states that a motion for judgment on the pleadings must be treated as one for summary judgment when matters outside the pleadings are presented to and not excluded by the court.

credit card debt was discharged and that FFCU had violated the § 524 discharge injunction.

As a separate ground for invalidating FFCU's lien, the court concluded that FFCU lost its lien rights by not participating in debtor's bankruptcy proceeding or filing a motion for reconsideration of the discharge order under Civil Rule 60(b)(4) (made applicable by Rule 9024) and the holding of United Student Aid Funds, Inc. v. Espinosa, __ U.S. __, 130 S.Ct. 1367 (2010).

The court scheduled an evidentiary hearing on December 14, 2010, to address the issues of debtor's damages and attorney's fees.

On December 9, 2010, debtor filed her application for attorney's fees and costs. Debtor also sought damages of $5,000, arguing that this sum was for a rental car because once she learned FFCU would repossess her car she stopped driving it. The record shows that debtor never rented a car.

On December 13, 2010, FFCU filed its opposition, arguing that no sanctions should be imposed due to its good faith belief that its lien on the Acura for the credit card debt was valid. FFCU also alleged that the attorney's fees sought were unreasonable.

On December 15, 2010, the bankruptcy court entered its Final Memorandum Of Decision And Order For Judgment. The court's decision substantially incorporated its previous findings, but the court specifically found that it was not necessary to decide whether the agreements at issue were adhesion contracts because the credit card debt was discharged.

The court further found that debtor's request for attorney's fees and costs was reasonable and awarded them in full, but denied her request for damages.

FFCU timely appealed and debtor cross appealed on the issue of damages.

II. JURISDICTION

The bankruptcy court had jurisdiction over this proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(K). We have jurisdiction under 28 U.S.C. § 158.[6]

III. ISSUE

Whether the bankruptcy court erred in granting summary judgment for debtor and denying FFCU's motion to dismiss or, in the alternative, for summary judgment.[7]

IV. STANDARDS OF REVIEW

A grant or denial of summary judgment by a bankruptcy court is reviewed de novo. Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003); Prestige Ltd.

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[6] We have jurisdiction to review both the grant of summary judgment to debtor and the denial of summary judgment to FFCU, because "[t]he grant of summary judgment [to debtor] is a final order . . . ." Rogers v. County of San Joaquin, 487 F.3d 1288, 1294 (9th Cir. 2007) (citing Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 694 (9th Cir. 1992)).

[7] We do not include a separate statement of issues included in FFCU's appeal; i.e., whether the court erred in granting summary judgment in favor of debtor when she never filed a motion and whether the court erred in awarding debtor attorney's fees for FFCU's violation of the discharge injunction nor do we include a separate statement on debtor's cross appeal regarding the court's denial of her request for damages. Those issues are mooted by our reversal of the bankruptcy court's decision to grant debtor summary judgment.

P'ship v. E. Bay Car Wash Partners (In re Prestige P'ship-Concord), 234 F.3d 1108, 1112-14 (9th Cir. 2000).

State law controls the construction of a contract. Flavor Dry, Inc. v. Lines (In re James E. O'Connell Co. Inc., 799 F.2d 1258, 1260 (9th Cir. 1986). Although contract interpretation involves mixed questions of law and fact, the application of contractual principles is a matter of law. Circle K Corp. v. Collins (In re Circle K Corp.), 98 F.3d 484, 486 (9th Cir. 1996). We review a bankruptcy court's legal conclusions and application of state law de novo. Id.

V. DISCUSSION

In applying our de novo review on summary judgment, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are genuine disputes as to any material facts and whether the bankruptcy court correctly applied the relevant substantive law. Graulty v. Brooks (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.), 819 F.2d 214, 215 (9th Cir. 1987). There are no disputed material facts relevant to the limited issue we decide in this appeal. Whether the cross collateral clause in the Security Agreement was valid and enforceable under NRS 104.9204 is a question of law.

Nevada adopted the revised U.C.C., effective July 1, 2001.[8] Nevada's version of U.C.C. § 9-204 on after-acquired property

[8] U.C.C. § 1-103(a)(3) states that the underlying purpose of the U.C.C. was to make uniform the law among the various jurisdictions. All fifty states have adopted the 2001 revision of Article 9. Kenneth Misken, Survey of Legislation: 2001 Arkansas General Assembly: Revised Article 9, 24 U. Ark. Little Rock L. Rev. 415, 415 (2002).

and future advances provides that "[a] security agreement may provide that collateral secures . . . future advances or other value, whether or not the advances or value are given pursuant to commitment." NRS 104.9204. Official Comment 5 explains this provision:

> [C]ollateral may secure future as well as past or present advances if the security agreement so provides. This is in line with the policy of this Article toward security interests in after-acquired property under subsection (a). Indeed, the parties are free to agree that a security interest secures any obligation whatsoever. Determining the obligations secured by collateral is solely a matter of construing the parties' agreement under applicable law. This Article rejects the holdings of cases decided under former Article 9 that applied other tests, such as whether a future advance or other subsequently incurred obligation was of the same or a similar type or class as earlier advances and obligations secured by the collateral.

Through adoption of the revised U.C.C. § 9-204, Nevada gives effect to cross collateral clauses. However, there is no controlling precedent or persuasive authority from Nevada's state courts (or federal courts) on the construction or validity of such clauses under the revised statute. Therefore, we are left to predict how the state's highest appellate court would rule if presented with the issue before us. Vestar Dev. II, LLC v. Gen. Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001).

We have previously recognized the usefulness of the Official Comments in interpreting the U.C.C. See NetBank, FSB v. Kipperman (In re Commer. Money Ctr., Inc.), 350 B.R. 465, 475 (9th Cir. BAP 2006). The directive of Official Comment 5 is sufficiently clear — the enforceability of a cross collateral clause is based on contract, which requires us to construe the parties' agreement under applicable law. See also NRS 104.9201

(a security agreement is effective according to its terms between the parties).

Moreover, the comment provides that revised U.C.C. § 9-204 rejects the holdings of cases decided prior to its adoption that have applied other tests, such as the relationship of the loans test or the reliance on the security test. See Auza, 181 B.R. 69-70 (finding Arizona law to employ both these tests). Therefore, we are not convinced that debtor's citations to Auza, In re Kim, 256 B.R. 793 (Bankr. S.D. Cal. 2000), In re Wollin, 249 B.R. 555 (Bankr. D. Or. 2000), or In re Gibson, 234 B.R. 776 (Bankr. N.D. Cal. 1999) have any bearing on the outcome of this appeal, as all those cases were decided prior to the adoption of the revised U.C.C. § 9-204. See In re Hobart, 2011 WL 1980332, at *8 (Bankr. D. Idaho 2011) (noting that cross collateral clause would be considered "valid and enforceable as long as the underlying agreement of the parties was clear in expressing such an intent" and rejecting Wollin as controlling authority); Nagata v. HFS Fed. Credit Union (In re Nagata), 2006 WL 2131318, at *2 (Bankr. D. Haw. 2006) (finding that the loan documents debtors signed unambiguously provided that their vehicle would secure their Visa debt and noting Auza, Kim and Wollin were inapplicable under the revised U.C.C.).

The case law cited by the bankruptcy court is not inapposite. See In re Branch, 368 B.R. 80 (Bankr. D. Colo. 2006) (relying on the Official Comment to the revised U.C.C. and state contract law, the court found the future advance clause enforceable because it was clear and unambiguous); In re Shemwell, 378 B.R. 166 (Bankr. W.D. Ky. 2007) (enforcing dragnet

clause because it was sufficiently broad, clear and unambiguous); In re Watson, 286 B.R. 594 (Bankr. D.N.J. 2002) (applying revised U.C.C. and finding dragnet clause enforceable).

Accordingly, we look to Nevada law governing contracts to ascertain the parties' intent. Under Nevada law, whether or not a document is ambiguous is a question of law for the court. Margrave v. Doormat Props., Inc., 878 P.2d 291, 293 (Nev. 1994). "A contract is ambiguous if it is reasonably susceptible to more than one interpretation." Id. If there is an ambiguity requiring extrinsic evidence to discern the parties' intent, summary judgment is improper. Id. However, an unambiguous contract is construed from the language of the document. Chwialkowski v. Sachs, 834 P.2d 405 (Nev. 1992).

The relevant contractual language in the Security Agreement reads: "[w]hat the Security Interest Covers - The security interest secures . . . any other advances you have now or receive in the future under the Plan and any other amounts or loans, including any credit card loan, you owe us for any reason now or in the future . . . ." We do not perceive that the clause is reasonably susceptible to more than one interpretation. It unambiguously states that FFCU holds a security interest in the Acura not only for the advance given, but for any other loans, including any credit card loan. Because the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, see 11 R. Lord, Williston on Contracts § 30:4 (4th ed. 1999), "[t]hat is the end of the inquiry." Nagata, 2006 WL 2131318, at

*2.

However, our conclusion does not end the litigation between the parties. On this record, we are not convinced that FFCU was entitled to summary judgment as FFCU contends on appeal. Although not artfully argued, debtor had raised the issue of whether applying the cross collateral clause would violate the duty of good faith under the U.C.C., which includes a requirement of "reasonable commercial standards of fair dealing." NRS 104.1201(t). Good faith is a question of fact. Mitchell v. Bailey and Selover, Inc., 605 P.2d 1138, 1139 (Nev. 1980). The bankruptcy court never addressed this argument when entering summary judgment for debtor. Therefore, we remand this issue to the bankruptcy court.

Moreover, in her statement of undisputed facts, debtor referred to the "fine print" in her Visa card application and she also refers to font sizes and paragraph labels in her brief. These arguments implicate an analysis of adhesion contracts and their enforceability under Nevada law. Nevada courts define an adhesion contract as "'a standardized contract form offered to consumers . . . on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain.'" Burch v. Second Jud. Dist. Ct. of State ex rel. County of Washoe, 49 P.3d 647, 649 (Nev. 2002). Under Nevada law, an adhesion contract may be enforced where there is "'plain and clear notification of the terms and an understanding consent[,]' and 'if it falls within the reasonable expectations of the weaker . . . party.'" Nevada courts do not enforce a contract, or any clause of a contract, that is unconscionable. Id.

NRS 104.1201(j) provides:

> 'Conspicuous,' with reference to a term, means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is 'conspicuous' or not is a decision for the court. Conspicuous terms include the following:
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> (1) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font or color to the surrounding text of the same or lesser size; and
>
> (2) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Further, "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause . . . ." See NRS 104.2303. Accordingly, we remand this claim to the bankruptcy court to determine these issues in the first instance.

Finally, we note that if the court determines that FFCU had a valid lien on debtor's car which secured her credit card debt, its lien would survive the bankruptcy discharge of the underlying debt without any action by FFCU. See § 506(d); Cortez v. Am. Wheel, Inc. (In re Cortez), 191 B.R. 174, 178 (9th Cir. BAP 1995) (citing Dewsnup v. Timm, 502 U.S. 410, 418 (1992)). In this regard, the bankruptcy court's reliance on Espinosa to reach a contrary result was misplaced.

VI. CONCLUSION

In sum, we REVERSE the bankruptcy court's grant of summary

judgment for debtor on the limited issue discussed above. However, we decline to enter summary judgment for FFCU. The bankruptcy court did not address whether the application of the cross collateral clause would violate the duty of good faith or whether the agreements at issue were unenforceable adhesion contracts under Nevada's U.C.C. Accordingly, we REMAND those remaining claims to the bankruptcy court for further proceedings.

Our conclusion renders FFCU's other assignments of error on appeal and debtor's cross appeal moot.