

DEC 01 2015

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	WW-14-1557-KiFJu
	)		
MICHAEL BATALI and	)	Bk. No.	11-10114
KELLIE BATALI,	)		
	)		
Debtors.	)		
_____	)		
	)		
MICHAEL BATALI;	)		
KELLIE BATALI,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
MIRA OWNERS ASSOCIATION,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on September 25, 2015,  
at Seattle, Washington

Filed - December 1, 2015

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Marc L. Barreca, Bankruptcy Judge, Presiding

Appearances: Richard J. Wotipka of Broihier & Wotipka argued for  
appellants Michael and Kellie Batali; Thomas J. Coy  
of Condominium Law Group PLLC argued for appellee  
Mira Owners Association.

Before: KIRSCHER, JURY and FARIS, 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 8024-1.

1 Debtors Michael and Kellie Batali ("Debtors") appeal an order  
2 denying the discharge of their postpetition condominium  
3 association assessments. For the reasons discussed, we AFFIRM.

4 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

5 The facts are undisputed.<sup>2</sup> Debtors filed their voluntary  
6 chapter 13<sup>3</sup> petition on January 6, 2011. On schedule A, Debtors  
7 listed, in addition to their residence and undeveloped land, an  
8 investment condominium located in Kirkland, Washington ("Kirkland  
9 Condominium") with a value of \$225,000. Debtors' schedules also  
10 disclosed that Bank of America, N.A. held two liens against the  
11 Kirkland Condominium originating from a first and second mortgage.  
12 Debtors also listed "Mira Condominium Owners" as a secured  
13 creditor with a lien against the Kirkland Condominium, describing  
14 the lien as:

15 Lien: condo assoc. statutory lien  
16 Security: [Debtors'] investment condominium  
Past Homeowners Dues & Water/Sewer

17 Debtors did not list the debt owed to "Mira Condominium Owners" as  
18 contingent, unliquidated or disputed. Debtors did not schedule  
19 any postpetition assessments as potential liabilities or  
20 contingent future obligations.

21 Debtors' statement of monthly net income contained on their  
22 \_\_\_\_\_

23 <sup>2</sup> Because the record did not include some relevant documents,  
24 we exercised our discretion to reach the merits of the appeal by  
25 independently reviewing the bankruptcy court's electronic docket  
26 and the imaged documents attached thereto. See O'Rourke v.  
Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58  
(9th Cir. 1988); Atwood v. Chase Manhattan Mortg. Co.  
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

27 <sup>3</sup> Unless specified otherwise, all chapter, code, 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 schedule J disclosed their average monthly income as \$18,874.00  
2 and their average monthly expenses as \$21,420.42, which included  
3 monthly installment payments of \$2,846.00 on the Kirkland  
4 Condominium.

5 Debtors' revised first amended chapter 13 plan ("Amended  
6 Plan") filed September 9, 2011, did not provide for any  
7 postpetition payments either within the plan or outside the plan  
8 on the Kirkland Condominium and provided for the surrender of that  
9 property. The Amended Plan provided: payments over sixty months;  
10 that the Kirkland Condominium would be surrendered to Bank of  
11 America, N.A. and "Mira Condominium Owners" upon confirmation; and  
12 that "all creditors to which the debtor is surrendering property  
13 pursuant to this section are granted relief from the automatic  
14 stay to enforce their security interest against the property  
15 including taking possession and sale[.]" The bankruptcy court  
16 confirmed the Amended Plan on October 28, 2011.

17 The bankruptcy court granted relief from the automatic stay  
18 to the secured lender on the Kirkland Condominium on September 9,  
19 2013, thereby permitting the secured lender to foreclose upon and  
20 obtain possession of the Kirkland Condominium. The secured lender  
21 foreclosed on the Kirkland Condominium on July 25, 2014.  
22 Likewise, on February 6, 2014, Mira Owners Association ("MOA")  
23 sought "relief from the automatic stay for purposes of pursuing a  
24 judgment against the Debtor for [postpetition] assessments, dues,  
25 costs, fees, and other charges." MOA attached a copy of the  
26 CONDOMINIUM DECLARATION FOR MIRA, A CONDOMINIUM ("Declaration") to  
27 its motion to modify stay. The Declaration, recorded in King  
28 County, Washington, on December 20, 2006, provides: in

1 Section 17.1, that MOA "has a lien on a Unit for any unpaid  
2 Assessment levied against a Unit from the time the Assessment is  
3 due[;]" and in Section 17.5, that "all sums assessed by the  
4 Association chargeable to any Unit, including all charges provided  
5 in this Article, shall be the personal obligation of the Owner of  
6 the Unit when the Assessment is made." Debtors did not oppose  
7 MOA's motion. On March 5, 2014, the bankruptcy court entered an  
8 order granting MOA relief from the automatic stay.<sup>4</sup> That order  
9 specifically provided:

10 1. In addition to the relief from stay accorded  
11 against the property pursuant to Debtors' Chapter 13  
12 Plan, Paragraph V, the automatic stay of [] § 362(a)  
13 shall be and hereby is terminated as to Creditor so that  
14 Creditor may enforce its rights at state law stay [sic]  
15 for purposes of pursuing a judgment against the Debtors  
16 for [postpetition] assessments, dues, costs, fees, and  
17 other charges.

18 On April 8, 2014, MOA sent Debtors a letter demanding that

---

19 <sup>4</sup> MOA asserted in its motion to modify stay that Debtors owed  
20 \$17,218.41 in postpetition arrears. MOA also maintained:

21 Creditor is a Washington nonprofit corporation and  
22 is the community association for The Mira Condominium.

23 \* \* \*

24 Pursuant to Creditor's recorded condominium  
25 declaration and [WASH. REV. CODE ("RCW") §] 64.34.364,  
26 Creditor has a statutory lien which arises automatically  
27 and is perfected at the time assessments come due, and  
28 which lien acts as security for its debt against the  
property.

\* \* \*

Debtor's obligation to pay [postpetition] assessments is  
an obligation arising out of a covenant running with the  
land, and is not subject to the discharge. Foster v.  
Double R Ranch Ass'n (In re Foster), 435 B.R. 650 (9th  
Cir. BAP 2010). Debtor is personally liable for all  
[postpetition] assessments coming due until such time as  
the property is foreclosed on, and such assessments are  
not affected by the bankruptcy. Id.

1 they pay \$26,507.96 in postpetition condominium association dues,  
2 fees and interest through May 12, 2014. On or about August 25,  
3 2014, MOA filed an action against Debtors in the Superior Court of  
4 the State of Washington, King County, seeking an award of  
5 "\$28,672.30 for past due assessments, fees, interest, and  
6 attorney's fees and costs, plus interest and attorney's fees and  
7 costs which become due before entry of judgment, together with  
8 interest[.]"

9       Thereafter, Debtors filed on October 8, 2014, a motion  
10 seeking a determination that: (1) the postpetition condominium  
11 association dues for the Kirkland Condominium would be discharged  
12 by Debtors' chapter 13 discharge; and (2) Debtors' confirmed  
13 Amended Plan eliminated MOA's right to assert a claim against  
14 Debtors for postpetition assessments. MOA opposed Debtors'  
15 motion.

16       The bankruptcy court orally denied Debtors' motion at a  
17 hearing held November 6, 2014.<sup>5</sup> The bankruptcy court, adopting  
18 the reasoning set forth by the Panel in Foster v. Double R Ranch  
19 Ass'n (In re Foster), 435 B.R. 650 (9th Cir. BAP 2010), concluded  
20 that the "ongoing ownership of property with a running covenant  
21 creates a postpetition claim even if the debtor does not use the  
22 property." The bankruptcy court then rejected Debtors' res

---

23  
24       <sup>5</sup> At the hearing, the bankruptcy court noted that the  
25 determination of whether a debt is dischargeable is a matter  
26 generally determined in an adversary proceeding. Debtor and MOA  
27 both waived the procedural elements afforded by Rule 7001 and  
28 agreed that the bankruptcy court could decide Debtors' motion as a  
contested matter. See United Student Aid Funds, Inc. v. Espinosa,  
559 U.S. 260, 272 (2010) ("Due process requires notice 'reasonably  
calculated, under all the circumstances, to apprise interested  
parties of the pendency of the action and afford them an  
opportunity to present their objections.'").

1 judicata argument, concluding that the confirmed Amended Plan did  
2 "not effectuate a transfer of the property[,]" and did not  
3 expressly provide for the discharge of any postpetition  
4 condominium association dues. The bankruptcy court entered a  
5 written order on November 13, 2014, which memorialized its oral  
6 ruling by providing that "the [Debtors' postpetition] homeowner  
7 assessments are not subject to discharge in this case."

8 Debtors timely appealed. Debtors also sought reconsideration  
9 of the bankruptcy court's November 13, 2014 order. On  
10 February 20, 2015, the bankruptcy court granted Debtors' request  
11 for reconsideration and entered a revised order that confined its  
12 ruling solely to the dischargeability of postpetition assessments  
13 in Debtors' chapter 13 bankruptcy case.

## 14 **II. JURISDICTION**

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

## 17 **III. ISSUE**

- 18 1. Whether Debtors' confirmed Amended Plan discharged Debtors'  
19 postpetition condominium association dues.
- 20 2. Whether postpetition condominium association dues on property  
21 surrendered under the terms of a confirmed chapter 13 plan  
22 are dischargeable under § 1328(a).

## 23 **IV. STANDARDS OF REVIEW**

24 In reviewing a bankruptcy court's determination of an  
25 exception to discharge, we review its findings of fact for clear  
26 error. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th  
27 Cir. BAP 2009). We review issues of statutory construction and  
28 conclusions of law de novo. Mendez v. Salven (In re Mendez),

1 367 B.R. 109, 113 (9th Cir. BAP 2007).

2 **V. DISCUSSION**

3 Debtors contend that three issues exist on appeal: (1) that  
4 the confirmed Amended Plan will discharge the postpetition  
5 condominium association dues owed to MOA and that the plan is res  
6 judicata; (2) that the postpetition condominium association dues  
7 will be discharged under § 1328(a); and (3) that the bankruptcy  
8 court inappropriately ruled that Debtors' postpetition condominium  
9 association dues would not be dischargeable under chapter 7 of the  
10 Bankruptcy Code. The bankruptcy court's Amended order entered  
11 February 20, 2015, renders Debtors' third argument on appeal moot  
12 and we will not discuss this issue further.

13 **A. Binding Effect of Confirmation**

14 Debtors argue that the terms of their confirmed Amended Plan  
15 bind MOA and will result in the discharge of MOA's claim for  
16 postpetition condominium association dues. The premise of this  
17 argument is correct. Section 1327(a) provides:

18 The provisions of a confirmed plan bind the debtor and  
19 each creditor, whether or not the claim of such creditor  
20 is provided for by the plan, and whether or not such  
creditor has objected to, has accepted, or has rejected  
the plan.

21 § 1327(a); Fadel v. DCB United LLC, Tr. of the Eisenhower UDT 7-  
22 22-11 (In re Fadel), 492 B.R. 1, 9-10 (9th Cir. BAP 2013). The  
23 bankruptcy court confirmed the Amended Plan on October 28, 2011.  
24 MOA had notice of the Amended Plan and did not object. Thus, the  
25 confirmed Amended Plan is binding upon MOA.

26 However, Debtors' confirmed Amended Plan made no mention of  
27 discharging Debtors' postpetition liability to MOA and thus cannot  
28 bind MOA with respect to the dischargeability of the postpetition

1 assessments. Simply stated, MOA received neither the notice nor  
2 the due process required by the Rules and Espinosa for a discharge  
3 of Debtors' postpetition condominium association dues.

4 The Panel further notes that the bankruptcy court granted MOA  
5 relief from the automatic stay on March 5, 2014, so MOA could  
6 specifically "pursu[e] a judgment against the Debtors for  
7 [postpetition] assessments, dues, costs, fees, and other charges."  
8 The March 5, 2014 order is directly at odds with Debtors' argument  
9 here. Debtors did not seek reconsideration of or appeal that  
10 order, which is now final.

11 **B. Discharge of Postpetition Condominium Association Dues**  
12 **Under § 1328(a)**

13 The record does not establish whether Debtors have completed  
14 their Amended Plan's payments and are now eligible for a discharge  
15 under § 1328(a). A prerequisite to the discharge on any debt  
16 under § 1328(a) is that Debtors complete all the payments due  
17 under the terms of their confirmed Amended Plan.<sup>6</sup> See e.g.,  
18 In re Khan, 504 B.R. 409, 413 (Bankr. D. Md. 2014) ("Until the  
19 discharge is entered, Debtor is stuck for the payment of [his  
20 postpetition condominium association fees].").

21 The issue of whether postpetition homeowner or condominium  
22 association assessments are dischargeable has been litigated  
23 through several cases. See e.g., In re Horton, 87 B.R. 650, 652  
24 (Bankr. D. Colo. 1987) (a chapter 7 debtor's postpetition  
25 homeowners' association assessments were not discharged; "[t]he

---

26  
27 <sup>6</sup> If this case were converted to chapter 7 or if Debtors were  
28 to seek a hardship discharge under § 1328(b), the Panel's analysis  
would not be necessary as the matter would be governed by statute.

1 benefits of owning property go hand in hand with the burdens  
2 arising from ownership"); In re Rink, 87 B.R. 653, 654 (Bankr. D.  
3 Colo. 1987) (postpetition condominium assessments are not  
4 discharged, but "the estate is responsible for any [postpetition]  
5 condominium assessments which arise during the administration of  
6 the estate"); In re Montoya, 95 B.R. 511, 513 (Bankr. S.D. Ohio  
7 1988) (In a chapter 7 case, the "fees assessable against a debtor  
8 pursuant to a declaration of condominium ownership and the by-laws  
9 of a unit owner association may be discharged as an unmatured  
10 claim where the debtor abandons the condominium and all rights  
11 associated with such ownership before or upon the bankruptcy  
12 filing"); and In re Elias, 98 B.R. 332, 337 (N.D. Ill. 1989)  
13 ("[C]ondominium assessments that accrue postpetition but arise out  
14 of a prepetition contract are 'debts' within the meaning of  
15 [§] 101(11) and are dischargeable in a Chapter 7 proceeding.")

16 In 1990, the Seventh Circuit Court of Appeals, in  
17 In re Rosteck, 899 F.2d 694, 695 (7th Cir. 1990), considered in a  
18 chapter 7 case "whether the bankruptcy court's December 1983  
19 discharge order discharged the Rostecks' obligation to pay  
20 [postpetition] condominium assessments" for a condominium in which  
21 the debtors did not reside. The court in Rosteck answered that  
22 question by examining when the debt arose. Id. According to that  
23 court, the condominium declaration was a prepetition contract from  
24 which the postpetition assessments arose. Id. at 696-97.  
25 Consequently, because the debtors' "debt for future assessments,  
26 based on their [prepetition] agreement to pay those assessments,  
27 existed when they filed their bankruptcy petition, that debt was  
28 discharged by the bankruptcy court in its discharge order." Id.

1 at 697. The condominium association in Rosteck argued that  
2 allowing debtors in bankruptcy to escape postpetition assessments,  
3 while still possibly residing in their homes, afforded debtors a  
4 "head start" rather than a "fresh start." Id. The Rosteck court  
5 admitted that its decision could be "troubling" but reasoned:

6 [W]e think the broad language Congress used in the  
7 Bankruptcy Code compels the result we reach. We have no  
8 power to change that language to reach a more palatable  
9 result. Contingent debts are still debts, and Congress  
has not exempted the type of debt in this case from  
discharge.

10 Id. Other courts reached a similar conclusion, See, e.g.,  
11 In re Cohen, 122 B.R. 755, 758 (Bankr. S.D. Cal. 1991);  
12 In re Garcia, 168 B.R. 320, 324-25 (Bankr. E.D. Mich. 1993).

13 In 1994, the Fourth Circuit Court of Appeals considered facts  
14 similar to those in Rosteck and reached a different conclusion on  
15 the issue of whether "a discharge in bankruptcy relieves a debtor  
16 from personal liability for [postpetition] assessments of  
17 cooperative housing dues." River Place E. Hous. Corp. v.  
18 Rosenfeld (In re Rosenfeld), 23 F.3d 833, 835 (4th Cir. 1994).  
19 The chapter 7 debtor in Rosenfeld did not live in the property  
20 and, in fact, had signed a consent order granting the mortgage  
21 lienholder relief from the automatic stay. Id. The debtor,  
22 however, retained ownership of the property. Id. The court in  
23 Rosenfeld, like the court in Rosteck, first considered the  
24 definition of the terms "debt" and "liability on a claim." Id. at  
25 836. But the court in Rosenfeld declined to follow Rosteck and  
26 its progeny, which held that an association's right to payment of  
27 dues arises when the contract is made and is contingent on the  
28 debtor's continued ownership of the property, and instead

1 concluded that postpetition assessments do not arise until they  
2 are assessed. The court in Rosenfeld reasoned that "the  
3 obligation to pay assessments is a function of owning the land  
4 with which the covenant runs" and the "obligation to pay the  
5 assessments arose from [the debtor's] continued ownership of the  
6 property and not from a [prepetition] contractual obligation."

7 Id. The court in Rosenfeld explained:

8 [The debtor's] personal liability under the covenant to  
9 pay assessments is not destroyed by River Place's access  
10 to alternative remedies, and even if Rosenfeld has not  
11 exercised the benefits of ownership, as title holder he  
12 has the legal right to do so. In order to terminate his  
13 responsibility for assessments, Rosenfeld must transfer  
14 title to the property, if necessary by a deed in lieu of  
15 foreclosure. In re Horton, 87 B.R. at 652; In re Rink,  
16 87 B.R. at 654. His consent to an order granting the  
17 mortgage holder relief from the automatic stay did not  
18 end his ownership.

19 Id. at 838.

20 In 1994, Congress responded to Rosteck<sup>7</sup> and its progeny by  
21 adding § 523(a)(16) to the Code. The Bankruptcy Reform Act of  
22 1994 became Public Law No. 103-394 on October 22, 1994, and  
23 excepted from discharge under §§ 727, 1141, 1228(a), 1228(b) or  
24 1328(b):

25 [A] fee or assessment that becomes due and payable after  
26 the order for relief to a membership association with  
27 respect to the debtor's interest in a dwelling unit that  
28 has condominium ownership or in a share of a cooperative  
housing corporation, but only if such fee or assessment  
is payable for a period during which-

(A) the debtor physically occupied a dwelling unit  
in the condominium or cooperative project; or

---

<sup>7</sup> Legislative history indicates that The Bankruptcy Reform Act of 1994 was in the drafting stages as early as January of 1994. Also, statements made on October 4, 1994, at 140 Cong. Rec. H. 10753 cite only Rosteck. It logically follows that the addition of § 523(a)(16) to the Code was a response to Rosteck and its progeny, and not a response to Rosenfeld.

1 (B) the debtor rented the dwelling unit to a tenant  
2 and received payments from the tenant for such  
period,

3 but nothing in this paragraph shall except from  
4 discharge the debt of a debtor for a membership  
5 association fee or assessment for a period arising  
before entry of the order for relief in a pending or  
subsequent bankruptcy case.

6 Section 523(a)(16) remained unchanged until the passage of  
7 the Bankruptcy Abuse Prevention and Consumer Protection Act of  
8 2005 ("BAPCPA"), Pub. L. 109-8 Stat. 23 § 442 (Apr. 20, 2005),  
9 when Congress amended § 523(a)(16) to include homeowners'  
10 associations and to delete the requirement that debtors physically  
11 reside in or collect rents from the unit. Section 523(a)(16) now  
12 excepts from discharge:

13 [A] fee or assessment that becomes due and payable after  
14 the order for relief to a membership association with  
15 respect to the debtor's interest in a unit that has  
16 condominium ownership, in a share of a cooperative  
17 corporation, or a lot in a homeowners association, for  
18 as long as the debtor or the trustee has a legal,  
equitable, or possessory ownership interest in such  
unit, such corporation, or such lot, but nothing in this  
paragraph shall except from discharge the debt of a  
debtor for a membership association fee or assessment  
for a period arising before entry of the order for  
relief in a pending or subsequent bankruptcy case[.]

19  
20 After § 523(a)(16) was added to the Code in 1994, and putting  
21 aside the issue concerning homeowner associations, the primary  
22 area of litigation concerning § 523(a)(16) shifted to chapter 13  
23 bankruptcy cases.

24 In 1997, a bankruptcy court considered whether postpetition  
25 time-share assessments relating to a surrendered time-share  
26 interest were discharged in a debtor's chapter 13 bankruptcy.  
27 In re Mattera, 203 B.R. 565 (Bankr. D.N.J. 1997). Following the  
28 language of § 1328(a), the court in Mattera framed the issue as

1 two-fold: "[W]hether the association's [postpetition] assessments  
2 constitute a 'debt' under [] § 1328(a), and, if so, whether that  
3 debt has been 'provided for' by debtor's Chapter 13 plan." Id. at  
4 570. The court, believing "that the Rosteck opinion best  
5 reflect[ed] a plain reading of the statutory definition of  
6 'claim'" and interpreting the terms "debt" and "claim" broadly,  
7 concluded:

8 [A]t the time of the filing of debtor's Chapter 13  
9 petition, the obligation of the debtor to Ocean High for  
10 [postpetition] assessments was a contingent, unmatured,  
11 unliquidated, unfixed right to payment which constituted  
12 a "claim" and a "debt" for § 1328(a) discharge purposes.  
13 The claim was contingent upon the retention of ownership  
14 by the debtor, and the regular assessment of fees by the  
15 association. The claim was not fixed in terms of a  
16 certain and definite amount due at the time of the  
17 filing of the petition. The debt would mature each month  
18 as assessments were made by the association.

14 Id. at 571. The Mattera court went on to explain:

15 Our conclusion that [postpetition] assessments  
16 constitute claims within the definition of [] § 101(5)  
17 and may, therefore, be discharged as an in personam  
18 obligation of the debtor does not mean that if the  
19 debtor continues to use the unit and/or receives benefit  
20 from it, that she may do so without compensating the  
21 association. While this factual scenario is not  
22 directly implicated here because debtor has certified  
23 that she did not use or benefit from the time-share  
24 following the filing of the petition, liability for  
25 [postpetition] use and occupancy, on theories of unjust  
26 enrichment and/or quantum meruit, might be available.  
27 See, e.g., In re Lamb, 171 B.R. 52, 55 (Bankr. N.D. Ohio  
28 1994).

23 Id. at 572. As to the second prong of the issue, the court in  
24 Mattera concluded that the debtor's postpetition assessments were  
25 provided for in the plan because debtor's plan provided for the  
26 surrender of the time-share and specifically listed the time-share  
27 association as a secured creditor. Id.

28 Years later, in a factual scenario alluded to but not present

1 in Mattera, the Ninth Circuit Bankruptcy Appellate Panel addressed  
2 whether a chapter 13 “debtor’s obligation to pay [homeowners’  
3 association (“HOA”)] dues after the order for relief [was] an  
4 affirmative covenant that runs with the land, unaffected by  
5 debtor’s discharge, or [was] it . . . a contractual obligation  
6 between the parties, making it a dischargeable prepetition debt.”  
7 In re Foster, 435 B.R. at 658. Importantly, the debtor in Foster  
8 did not intend to surrender his home, but instead, merely sought  
9 to discharge his postpetition homeowner association dues.

10 The debtor in Foster raised two arguments on appeal. The  
11 first argument involved whether § 523(a)(16) is applicable to  
12 § 1328(a); the parties conceded that § 523(a)(16) was inapplicable  
13 to a discharge under § 1328(a). Id. at 657-58. The second  
14 argument involved whether the postpetition HOA dues constituted  
15 prepetition debts that arose out of a prepetition contract. Id.  
16 In addressing the debtor’s second argument, the Panel in Foster  
17 did not answer the specific question of “[w]hether the omission of  
18 § 1328(a) in § 523(a)(16) or vice versa [was] a statutory  
19 misstep.” Id. at 659. Instead, the Panel concluded that “[u]nder  
20 Washington law, the affirmative covenant to pay HOA dues is not  
21 contractual, but is a covenant running with the land. As such,  
22 debtor’s personal liability for the dues is an incidence of  
23 ownership of his property not affected by the filing of his  
24 bankruptcy.” Id. at 653.

25 In reaching its decision, the Panel first examined Rosteck,  
26 Rosenfeld and the history of § 523(a)(16). Because of the broad  
27 dischargeability provisions afforded chapter 13 debtors, the Panel  
28 expressed its “doubt [that] the omission of § 1328(a) in

1 § 523(a)(16) or vice versa evinces a legislative intent to  
2 discharge postpetition HOA dues under § 1328(a) when the debtor  
3 used the cure and maintenance provisions under chapter 13 to stay  
4 in his or her property." 435 B.R. at 559.

5 The Panel in Foster then examined Washington law and  
6 concluded:

7 [U]nder Washington law and the Declaration, debtor's  
8 obligation to pay the HOA dues was a function of owning  
9 the land with which the covenant runs and not from a  
10 prepetition contractual obligation. As such, the  
11 holding in Rosenfeld is persuasive. It follows that  
debtor's liability is "not 'rooted in the  
[prebankruptcy] past', but rather [is] rooted in the  
estate in property itself."

12 Id. at 660-61 (quoting Beeter v. Tri-City Prop. Mgmt. Servs., Inc.  
13 (In re Beeter), 173 B.R. 108, 122 (Bankr. W.D. Tex. 1994)). The  
14 Panel concluded that the Rosenfeld approach was consistent with  
15 the RESTATEMENT (THIRD) OF PROPERTY. Id. at 661. And finally, the  
16 Panel in Foster noted the different treatment of property rights  
17 and contract rights under the Bankruptcy Code:

18 While a debtor's personal obligation under a contract  
19 may be discharged in most instances, "bankruptcy power  
is subject to the Fifth Amendment's prohibition against  
taking private property without compensation."  
20 In re Rivera, 256 B.R. 828, 834 (Bankr. M.D. Fla. 2000)  
21 (quoting United States v. Sec. Indus. Bank, 459 U.S. 70,  
75 [] (1982)). "A homeowners' association's right to  
22 impose postpetition assessments pursuant to a recorded  
Declaration of Covenants and Restrictions is within the  
23 scope of the traditional property interests protected by  
the Fifth Amendment." Rivera, 256 B.R. at 834.

24 Although § 101(5)(A) defines a "claim" as a "right  
25 to payment", "[t]he key to distinguishing a right to  
payment that is or is not subject to . . . discharge is  
26 simply whether the right to payment is based on a  
property interest or something else." Id. at 833.  
27 Since Washington law does not view the Declaration as a  
contract (or "something else") and the affirmative  
28 covenant to pay HOA dues is one that runs with the land,  
it follows that the Association's right to payment of

1 unassessed postpetition HOA dues is based on a property  
2 interest not subject to discharge under § 1328(a). The  
Rivera court explained the reason for this rule:

3 A covenant running with the land, including any  
4 express provision for the debtor to be personally  
5 obligated to pay the homeowners' association, is an  
6 integral part of the property which the debtor  
7 acquired when the debtor acquired title to the  
8 property. The debtor never had title clear of the  
9 previously recorded covenant running with the land.  
10 Even though a mortgage and deed may be executed  
11 simultaneously, they are separate transactions.  
12 The debtor's acceptance of a deed and the  
13 corresponding recorded covenants, however, is one  
14 single and inseparable transaction. Therefore, to  
15 release the debtor from a recorded covenant is to  
16 take a property interest away from the homeowners'  
17 association and give the debtor a property interest  
18 which the debtor never had in the first place. Any  
19 release from a covenant would in effect be a forced  
20 conveyance of a property interest from the  
21 homeowners' association to the debtor, something  
22 clearly beyond the scope of the Chapter 7  
23 discharge.

14 Rivera, 256 B.R. at 833-34.

15 Accordingly, we hold that, as a matter of law,  
16 debtor's personal liability for HOA dues continues  
17 postpetition as long as he maintains his legal,  
18 equitable or possessory interest in the property and is  
19 unaffected by his discharge. In essence, the 'running'  
20 covenant rule in this case boils down to one of 'you  
21 stay, you pay' since debtor's confirmed plan indicates  
22 he will stay in his home by curing prepetition default  
23 on his mortgage and maintain on-going payments through  
24 his confirmed Chapter 13 plan.

21 Foster, 435 at 661.

22 Under Washington law, the Foster Panel found that a recorded  
23 condominium declaration, such as MOA's, runs with the land and is  
24 a property right that cannot be extinguished in a bankruptcy. The  
25 "you stay, you pay" rule is the logical extension of that finding;  
26 as long as a debtor continues to have an interest in the property  
27 at issue, he cannot discharge the postpetition assessments that  
28 arise from the covenant that runs with the property.

1 Debtors construe Foster's holding as simply one of "you stay,  
2 you pay," and argue it is not controlling because Debtors have not  
3 occupied the Kirkland Condominium during the postpetition period  
4 and have indicated their intent to surrender it pursuant to the  
5 terms of their confirmed Amended Plan. Rather, citing  
6 In re Coonfield, 517 B.R. 239 (Bankr. E.D. Wash. 2014), Debtors  
7 argue that "[MOA's] claim for the ongoing assessments that are at  
8 issue . . . is merely the 'contingent', 'unmatured' and  
9 'unliquidated' portion of [MOA]'s pre-petition claim and its  
10 status as a debt for purposes of discharge under [§] 1328(a) is  
11 not dependant on characterization of the obligation as one arising  
12 from 'a covenant running with the land' versus one 'flowing from a  
13 contract.'"

14 The court in Coonfield held that the chapter 13 debtors could  
15 discharge their postpetition homeowner association dues,  
16 reasoning:

17 A contrary interpretation of the law divests [§]  
18 § 523(a)(16) of significance. If personal liability on  
19 such obligations arise [postpetition] as the Homeowners  
20 Association urges, [§] 523(a)(16) is rendered  
21 meaningless and simply restates a principle already  
22 infused in bankruptcy law; i.e., that a right to payment  
23 arising [postpetition] is not subject to discharge.

24 Id. at 243. Coonfield's reasoning is not persuasive. First,  
25 Coonfield runs contrary to our precedent in Foster. Moreover, as  
26 discussed earlier, Congress added § 523(a)(16) to the Code in  
27 response to Rosteck, which held that the debtors' postpetition  
28 condominium assessments were discharged because they were debts  
stemming from a prepetition contractual obligation. Congress's  
concern with Rosteck's holding could only be that the postpetition  
assessments were not debts, or if they were debts, that they were

1 not prepetition debts. This highlights the flaw in Coonfield's  
2 analysis, and also the ambiguity created by the absence of a  
3 reference to § 523(a)(16) in § 1328(a)(2).

4 Foster is well-reasoned and consistent with canons of  
5 statutory construction set forth by both the Supreme Court and the  
6 Ninth Circuit Court of Appeals. Foster dictates that the Debtors  
7 in this case may not extinguish MOA's recorded Declaration and may  
8 not discharge their postpetition assessments, even though they did  
9 not reside in the Kirkland Condominium postpetition. Unlike the  
10 court in Coonfield, the Panel in Foster was not persuaded "that  
11 § 523(a)(16) establishes generally that postpetition HOA dues  
12 constitute 'claims' or 'debts' which can be discharged [under  
13 § 1328(a)]." Foster, 435 B.R. at 659. The Panel's reasoning in  
14 Foster was two-fold. Id. First, § 523(a)(16) is not applicable  
15 to a discharge under § 1328(a), and second, "state law governs the  
16 substance of claims." Id. As discussed earlier, the Panel in  
17 Foster found the holding in Rosenfeld persuasive and concluded  
18 that under Washington law, "the HOA dues [were] a function of  
19 owning the land with which the covenant runs" and as a  
20 consequence, "the Association's right to payment of unassessed  
21 postpetition HOA dues is based on a property interest not subject  
22 to discharge under § 1328(a)." Id. at 660-61.

23 Foster holds that the nondischargeable liability continues to  
24 accrue "as long as [the debtor] maintains his legal, equitable **or**  
25 possessory interest in the property . . . ." Id. at 661 (emphasis  
26 added). While the Debtors had given up possession of the Kirkland  
27 Condominium, they had not divested themselves of their legal and  
28 equitable ownership interests in it. As the bankruptcy court

1 correctly noted, surrender under the plan “[did] not effectuate a  
2 transfer of the property.” See Pratt v. Gen. Motors Acceptance  
3 Corp. (In re Pratt), 462 F.3d 14, 18-19 (1st Cir. 2006);  
4 In re Rosa, 495 B.R. 522, 523 (Bankr. D. Haw. 2013) (“surrender  
5 does not transfer ownership of the surrendered property. Rather,  
6 ‘surrender’ means only that the debtor will make the collateral  
7 available so the secured creditor can, if it chooses to do so,  
8 exercise its state law rights in the collateral”); In re Gollnitz,  
9 456 B.R. 733, 736 (Bankr. W.D.N.Y. 2011) (“Authorization for  
10 surrender does not constitute a transfer of title. Rather,  
11 transfer requires both the surrender of an interest and its  
12 acceptance.”). Subject to exceptions not applicable here, under  
13 Washington law, “[e]very conveyance of real estate, or any  
14 interest therein . . . shall be by deed[.]” RCW § 64-04.010. To  
15 qualify as a deed, an instrument must comply with RCW § 64.04.020,  
16 which requires that “[e]very deed shall be in writing, signed by  
17 the party bound thereby, and acknowledged by the party before some  
18 person authorized by this act to take acknowledgments of deeds.”  
19 The confirmed Amended Plan does not substitute for a deed.

20 Under the facts as presented, Debtors were the owners of the  
21 Kirkland Condominium until July 25, 2014, when the secured lender  
22 foreclosed. As such, the postpetition condominium association  
23 dues assessed between Debtors’ petition date and July 25, 2014,  
24 are not discharged under § 1328(a).

## 25 VI. CONCLUSION

26 For the foregoing reasons, we AFFIRM the ruling of the  
27 bankruptcy court.

28