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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NOT FOR PUBLICATION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-16-1228-LKuF
)	BAP No. CC-16-1244-LKuF
ALELI A. HERNANDEZ,)	(consolidated appeals)
)	
Debtor.)	Bk. No. 8:15-bk-10563-TA
_____)	
)	
ASSET MANAGEMENT HOLDINGS,)	
LLC,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
ALELI A. HERNANDEZ,)	
)	
Appellee.)	
_____)	

Argued and Submitted on March 23, 2017
at Pasadena, California

Filed - April 11, 2017

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Vanessa M. Haberbusch of Haberbusch & Associates LLP
argued for Appellant Asset Management Holdings,
LLC; Gregory M. Salvato of Salvato Law Offices
argued for Appellee Aleli A. Hernandez.

Before: LAFFERTY, KURTZ, and FARIS, 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 8024-1.

1 **FACTS**

2 Aleli Hernandez obtained a discharge in an individual
3 chapter 7 case filed in April 2010. Among the debts listed in
4 the chapter 7 case were two debts secured by deeds of trust
5 against Debtor's residence in Mission Viejo, California (the
6 "Mission Viejo Property").

7 Nearly five years later, on February 5, 2015, Debtor filed
8 the instant chapter 13 case. On Schedule A, Debtor listed the
9 Mission Viejo Property with a value of \$950,000; on Schedule D,
10 she again listed two deeds of trust against the residence, a
11 first deed of trust in favor of "Chase" in the amount of
12 \$1,036,490.00 and a second deed of trust in favor of SW Linear
13 Investment Group, LLC ("SW Linear") in the amount of \$0, with the
14 notation "Motion to Avoid Lien to be filed." Debtor also listed
15 SW Linear on Schedule F with an unsecured debt of \$278,396.71,
16 again with the notation "Motion to Avoid Lien to be filed."
17 Debtor filed a proposed chapter 13 plan on February 19, 2015.
18 AMH filed a proof of claim for \$459,221.60 on June 15, 2015.

19 On May 22, 2015, Debtor filed a motion under § 506 to value
20 SW Linear's lien at \$0.³ On June 3, 2015, before the lien
21 valuation matter was heard, SW Linear and AMH⁴ filed a motion to
22

23 ³ Debtor's motion was entitled "Motion to Avoid Junior Lien
24 on Principal Residence [11 U.S.C. § 506(d)]." However, because
25 avoidance will not occur until Debtor completes her plan, we
refer to such a motion as a "motion to value lien at zero."

26 ⁴ According to pleadings filed in the bankruptcy court, AMH
27 is an "affiliate of and successor in interest to SW Linear
Investment Group, LLC." Pleadings in the bankruptcy court were
initially filed jointly by SW Linear and AMH. Beginning in

28 (continued...)

1 dismiss Debtor's chapter 13 case on the ground that Debtor's
2 debts exceeded the limits established by § 109(e). SW Linear/AMH
3 argued that if its lien were valued at zero, it would have an
4 unsecured claim of \$459,221.60; thus, Debtor's unsecured debts
5 would exceed the \$383,175 limit under § 109(e). Alternatively,
6 SW Linear/AMH argued that if its lien were not valued at zero,
7 Debtor's secured debts would total \$1,494,734.97 (\$1,035,513.37 +
8 \$459,221.60), thus exceeding the secured debt limit of
9 \$1,149,525.

10 Over the next year, beginning on June 17, 2015, the
11 bankruptcy court held five hearings on plan confirmation and the
12 motion to dismiss. During that time the parties submitted two
13 more rounds of briefs on the eligibility issue. In the meantime,
14 at the July 8, 2015 hearing, the bankruptcy court granted
15 Debtor's motion to value her residence for purposes of valuing SW
16 Linear's junior lien at zero.

17 On August 18, 2015, AMH filed a Second Amended Objection to
18 Confirmation, arguing that Debtor's plan was not filed in good
19 faith because it was filed primarily to avoid AMH's lien and
20 prevent foreclosure. AMH also asserted that Debtor and her
21 husband had "engaged in a lengthy 5 year succession of serial and
22 individual filings to prevent foreclosure of the [Mission Viejo
23 Property]," citing Debtor's 2010 chapter 7 filing, her husband's
24 2012 chapter 7 filing, and the instant chapter 13.

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⁴(...continued)
28 August 2015, AMH began filing pleadings solely in its own name.

1 At the final hearing on confirmation and on the motion to
2 dismiss held June 15, 2016, the bankruptcy court denied AMH's
3 motion to dismiss, overruled AMH's objection to confirmation, and
4 confirmed Debtor's plan. AMH timely appealed both orders.⁵

5 **JURISDICTION**

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
7 §§ 1334 and 157(b) (2) (A) and (L). We have jurisdiction under 28
8 U.S.C. § 158.

9 **ISSUES**

10 Did the bankruptcy court err in denying AMH's motion to
11 dismiss Debtor's chapter 13 case on eligibility grounds?

12 Did the bankruptcy court err in overruling AMH's objection
13 to confirmation?

14 **STANDARDS OF REVIEW**

15 Eligibility determinations under § 109 involve issues of
16 statutory construction and conclusions of law, including
17 interpretation of the Bankruptcy Code, which we review de novo.
18 Smith v. Rojas (In re Smith), 435 B.R. 637, 642 (9th Cir. BAP
19 2010).

20 The bankruptcy court's determination regarding a debtor's
21 good faith in proposing a chapter 13 plan for confirmation is a
22 factual finding that we review for clear error. Meyer v. Lepe
23 (In re Lepe), 470 B.R. 851, 855 (9th Cir. BAP 2012).

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27 ⁵ The appeals were consolidated by order of a BAP motions
28 judge on September 19, 2016.

1 counted as a secured debt because AMH's lien was wholly unsecured
2 on the petition date and thus was subject to being valued at zero
3 pursuant to § 506(b); and the debt should not be counted as an
4 unsecured debt because Debtor's personal liability for the debt
5 had been discharged in her prior chapter 7 case. On appeal, AMH
6 contends that this conclusion was error because Debtor's
7 discharge did not affect its lien and thus on the petition date,
8 AMH had an in rem (secured) claim against the estate.
9 Alternatively, AMH contends that the debt should have been
10 included in the unsecured debt calculation as a claim against the
11 estate, relying on Ninth Circuit chapter 12 eligibility cases and
12 bankruptcy court chapter 13 cases. However, controlling
13 authority does not support AMH's position.

14 The salient facts and eligibility issues presented in this
15 appeal are virtually identical to those presented in this Panel's
16 recent decision in Free v. Malaier (In re Free), 542 B.R. 492
17 (9th Cir. BAP 2015), which controls the outcome here. See
18 People's Capital and Leasing Corp. v. Big3D, Inc. (In re Big3D,
19 Inc.), 438 B.R. 214, 226 (9th Cir. BAP 2010) (noting that this
20 Panel regards "precedents established in its prior published
21 decisions as binding on the Panel absent changes in the
22 Bankruptcy Code or controlling decisions by the Ninth Circuit
23 Court of Appeals or United States Supreme Court").

24 In Free, this Panel held, as a matter of first impression,
25 that debtors who had previously obtained a chapter 7 discharge of
26 their personal liability for wholly unsecured junior liens
27 against their residence were not required to include that debt as
28 an unsecured debt for purposes of the chapter 13 eligibility

1 calculation. The Panel agreed with the analysis of In re Shen
2 as, No. 11-41332 EDJ, 2011 WL 3236182 (Bankr. N.D. Cal. July 28,
3 2011). There, the bankruptcy court ruled, under similar facts,
4 that because the unsecured portion of the debt was no longer
5 enforceable against the debtor, it was not allowable as an
6 unsecured claim in the chapter 13 case. As such, debtors did not
7 owe any unsecured debt to the creditor for purposes of the
8 unsecured debt limitation of § 109(e). In re Free, 542 B.R. at
9 496 (citing In re Shen
10 as, 2011 WL 3236182, at *1).

11 The Panel in Free reasoned that its holding was not in
12 conflict with Johnson v. Home State Bank, 501 U.S. 78 (1991), a
13 case that has been cited in other eligibility cases to support
14 the inclusion of wholly unsecured discharged debts in the
15 eligibility calculation. See, e.g., In re Scotto-DiClemente, 463
16 B.R. 308 (Bankr. D.N.J. 2012), aff'd sub nom., In re DiClemente,
17 2012 WL 3314840 (D.N.J. Aug. 13, 2012). In Johnson, the Supreme
18 Court held that a mortgage lien that secured an obligation for
19 which a debtor's personal liability has been discharged in a
20 chapter 7 liquidation was a claim subject to inclusion in an
21 approved Chapter 13 reorganization plan. The Supreme Court
22 observed that the term "debt" is defined as "liability on a
23 claim" and is thus coextensive with the term "claim." Therefore,
24 the Court concluded that the mortgage lien was a claim within the
25 terms of § 101(5) because the mortgage lien holder retained a
26 "right to payment" in the form of its right to the proceeds from
27 the sale of the debtor's property. 501 U.S. at 84. Observing
28 that "a bankruptcy discharge extinguishes only one mode of
enforcing a claim--namely, an action against the debtor in

1 personam--while leaving intact another--namely, an action against
2 the debtor in rem[,]” id., the Court held that the bankruptcy
3 court must allow a claim “if it is enforceable against **either** the
4 debtor **or** his property[,]” id. at 85 (emphasis in original).

5 Johnson was not an eligibility case, and the Panel in Free
6 interpreted Johnson as deciding only whether an in rem claim for
7 which personal liability has been discharged could properly be
8 addressed in a chapter 13 plan, **not** whether such a claim needed
9 to be included in the eligibility calculation. See In re Free,
10 542 B.R. at 497.

11 The Free Panel concluded:

12 [W]e do not see how the purposes of a chapter 13
13 reorganization are met by counting the discharged
14 unsecured obligations of the chapter 20 debtor in the
15 eligibility calculation. Assuming the case is filed in
16 good faith and proper chapter 13 purposes—such as
17 curing an arrearage on a first mortgage or paying
18 priority tax debt—are present, it makes no sense to
19 include in the debt limit calculation a claim for which
20 the right to payment has been discharged. Neither the
21 Code nor case law compels inclusion of the discharged
22 in personam liability in such calculation.

23 Id. at 501.

24 AMH acknowledges the holding of Free but argues that the
25 debt must be included as a **secured** debt, an issue that Free did
26 not analyze. Alternatively, AMH urges this Panel to disregard
27 Free and hold that AMH’s claim should be counted as unsecured.

28 **1. The AMH debt should not be included in the eligibility
calculation as a secured debt.**

AMH argues that when the in rem liability of a secured
claim remains after the in personam liability is extinguished,
the debt must be considered when evaluating the debt limitation

1 eligibility requirements under chapter 13, citing the chapter 12
2 eligibility cases of Quintana v. Internal Revenue Serv. (In re
3 Quintana) (Quintana I), 107 B.R. 234 (9th Cir. BAP 1989), aff'd
4 sub nom., Quintana v. Commissioner (In re Quintana) (Quintana
5 II), 915 F.2d 513 (9th Cir. 1990); and Davis v. Bank of America
6 (In re Davis) (Davis I), Nos. CC-11-1692-MkDKi, ND 11-10994-RR,
7 2012 WL 3205431 (9th Cir. BAP Aug. 3, 2012), aff'd sub nom.,
8 Davis v. U.S. Bank, N.A. (In re Davis) (Davis II), 778 F.3d 809
9 (9th Cir. 2015).

10 In the Quintana cases, a judgment creditor had agreed to
11 waive any right to a deficiency judgment against the debtors
12 after sale of the real property subject to its judgment lien.
13 Debtors asserted that the creditor's waiver made the judgment a
14 nonrecourse obligation and thus only the secured value of the
15 judgment lien needed to be included toward the aggregate debt
16 limit for a family farmer. The bankruptcy court disagreed; on
17 appeal, this Panel held that because the term "aggregate debts"
18 includes "all types of debts," and because the creditor retained
19 a right to payment against the real property, the entire amount
20 needed to be included in the eligibility calculation. Quintana
21 I, 107 B.R. at 237. The Ninth Circuit Court of Appeals affirmed
22 on somewhat narrower grounds, holding that because the property
23 had not yet been sold, the waiver had no relevance to the
24 calculation. Quintana II, 915 F.2d at 517.

25 In the Davis cases, the debtor had discharged her personal
26 liability in a chapter 7 case. Although her secured debts
27 exceeded the chapter 12 eligibility limit, the debtor argued that
28 because her personal liability had been discharged, only the

1 aggregate debt secured by her real property had to be counted.
2 The bankruptcy court disagreed. On appeal, the BAP, citing
3 Quintana I and Quintana II, reasoned that the entire amount of
4 the debt should be included because the full amount continued to
5 be a claim against the collateral. On further appeal to the
6 Ninth Circuit, that court held that the term "aggregate debts" in
7 § 101(18) (A) included "the unsecured portion of a creditor's
8 claim from which the debtor has been discharged in an earlier
9 chapter 7 bankruptcy proceeding." Davis II, 778 F.3d at
10 812.

11 AMH interprets Davis II's holding that aggregate debts
12 include the unsecured portion of a creditor's claim from which
13 the debtor has been discharged in an earlier chapter 7 to mean
14 that undersecured but discharged claims against property of the
15 debtor must count towards the chapter 13 debt limits as a secured
16 debt.

17 However, the Panel in Free expressly rejected reliance on
18 these chapter 12 eligibility cases, finding that they were not
19 controlling because they considered only the aggregate debt
20 limit, and none of them addressed revival of discharged in
21 personam liability. In re Free, 542 B.R. at 499.

22 AMH acknowledges that a debtor may avoid a partially or
23 wholly unsecured lien in a chapter 13 but argues that § 109(e)
24 limits the eligibility analysis to the petition date and that
25 even if a debtor may be able to avoid an unsecured lien, the
26 avoidance does not become final until the debtor receives a
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1 discharge.⁶ However, this argument ignores Ninth Circuit
2 authority that in making the eligibility determination, the court
3 need not ignore circumstances that will permit the court to
4 easily ascertain whether a debt should be classified as secured
5 or unsecured, see In re Scovis, 249 F.3d at 983, and that the
6 unsecured portion of undersecured debt is counted as unsecured
7 for § 109(e) eligibility purposes, id.; In re Smith, 435 B.R. at
8 647-48. As such, we see no basis for AMH's argument that its
9 claim should be classified as secured for eligibility purposes,
10 and AMH has cited no authority supporting such a conclusion.

11 **2. The AMH debt should not be included in the eligibility**
12 **calculation as an unsecured debt.**

13 Alternatively, AMH contends that the unsecured portion of
14 its claim should be included as an unsecured debt in the
15 eligibility calculation. AMH asks this Panel to ignore Free and
16 follow the holdings of In re Scotto-DiClemente, 463 B.R. 308; and
17 In re Wimmer, 512 B.R. 498 (Bankr. S.D.N.Y. 2014). In both of
18 those cases, the bankruptcy courts applied the reasoning of
19 Johnson (i.e., that if a claim is enforceable against either
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21 ⁶ In HSBC Bank USA, N.A. v. Blendheim (In re Blendheim),
22 803 F.3d 477, 497 (9th Cir. 2015), a case decided while this
23 matter was pending in the bankruptcy court, the Ninth Circuit
24 Court of Appeals held that a chapter 13 debtor may avoid the
25 unsecured portion of a lien upon successful completion of a
chapter 13 plan even if the debtor is not eligible for a
discharge.

26 In footnote 9 of its opening brief, AMH acknowledges that
27 the Ninth Circuit BAP has so held, citing Boukatch v. MidFirst
28 Bank (In re Boukatch), 533 B.R. 292, 301 (9th Cir. BAP 2015). In
light of Blendheim and Boukatch, we construe AMH's argument to be
that a lien avoidance is not final until the debtor successfully
completes her plan.

1 debtor **or** debtor's property it may be provided for in a chapter
2 13 plan) to conclude that the unsecured portion of an in rem
3 claim must be included in the chapter 13 eligibility calculation
4 despite a prior chapter 7 discharge. In re Scotto-DiClemente,
5 463 B.R. at 311-14; In re Wimmer, 512 B.R. at 510-12.

6 AMH also cites various California bankruptcy court cases
7 ruling that a chapter 20 debtor may not eliminate the unsecured
8 portion of a lien-stripped claim for plan purposes. In re Hill,
9 440 B.R. 176, 178-84 (Bankr. S.D. Cal. 2010); In re Akram, 259
10 B.R. 371 (Bankr. C.D. Cal. 2001); In re Gounder, 266 B.R. 879
11 (Bankr. E.D. Cal. 2001). However, in addition to the fact that
12 these authorities are not binding on this Panel, none of them
13 involve eligibility determinations, and to apply their reasoning
14 here would require us to ignore Free. We decline to do so.

15 Apparently recognizing that the relevant authorities are not
16 in its favor, AMH argues that as a matter of policy, not
17 including the discharged unsecured portion of a secured claim in
18 a chapter 13 filed subsequent to a chapter 7 would destroy the
19 rights of creditors holding undersecured claims and cause
20 unnecessary litigation in chapter 7 bankruptcies: AMH contends
21 that if creditors risk losing both their secured and unsecured
22 claims by debtors who first file a chapter 7 to wipe out their in
23 personam liability (while intending to then file a chapter 13 to
24 wipe out the in rem liability), creditors will bring objections
25 in every chapter 7 bankruptcy where their claim is undersecured
26 in the form of an objection to the discharge of the in personam
27 liability or a motion to dismiss the chapter 7 as a bad faith
28 filing. At the same time, AMH argues, debtors would not be

1 seriously harmed because if their debts are over the chapter 13
2 eligibility limits they may file chapter 11 instead.

3 To be blunt, this argument is nonsensical. A secured
4 creditor could not prevail on an objection to discharge or a
5 motion to dismiss for bad faith in a chapter 7 case on grounds
6 that a debtor **intended** to file a subsequent chapter 13 to
7 eliminate the creditor's lien. AMH (and undoubtedly every other
8 undersecured lien creditor) is unhappy that its entire claim may
9 be eliminated through serial chapter 7 and chapter 13 filings,
10 but binding precedent holds that in the absence of bad faith,
11 there is no prohibition on doing so.

12 In sum, AMH has not presented any argument or authority that
13 would warrant departure from our holding in Free. The bankruptcy
14 court did not err in ruling that AMH's claim did not need to be
15 included as either a secured or unsecured debt in calculating
16 chapter 13 eligibility in this case.

17 **B. The bankruptcy court did not err in overruling AMH's bad**
18 **faith objection to confirmation.**

19 AMH argues that Debtor's bankruptcy petition was not filed
20 in good faith because its sole purpose was to strip AMH's lien,
21 pointing out that Debtor does not have significant unsecured
22 claims or other issues that need to be dealt with in the chapter
23 13. AMH contends that permitting Debtor's case to proceed would
24 permit her to improperly circumvent the rule that a lien may not
25 be stripped in a chapter 7. Dewsnup v. Timm, 502 U.S. 410, 417
26 (1992).

27 To determine whether a chapter 13 case was filed in bad
28 faith, the bankruptcy court should consider:

1 (1) whether the debtor misrepresented facts in his petition
2 or plan, unfairly manipulated the Bankruptcy Code, or otherwise
3 filed his chapter 13 petition or plan in an inequitable manner;

4 (2) the debtor's history of filings and dismissals;

5 (3) whether the debtor only intended to defeat state court
6 litigation; and

7 (4) whether egregious behavior is present. Leavitt v. Soto
8 (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

9 The bankruptcy court declined to dismiss the case on bad
10 faith grounds because controlling case law did not support the
11 conclusion that a chapter 20 filing is per se bad faith. This
12 observation is correct. See Johnson, 501 U.S. at 87; In re
13 Blendheim, 803 F.3d at 500; In re Free, 542 B.R. at 501. AMH
14 argues that the bankruptcy court failed to take into account the
15 totality of the circumstances, but the record does not support
16 this conclusion. And AMH points to nothing in the record to
17 indicate that Debtor misrepresented facts, unfairly manipulated
18 the Bankruptcy Code, filed her chapter 13 petition or plan in an
19 inequitable manner, had a history of multiple bankruptcy filings,
20 was attempting to defeat state court litigation, or exhibited
21 egregious behavior. Therefore, we cannot conclude that the
22 bankruptcy court erred in finding that Debtor's petition and plan
23 were filed in good faith.

24 **CONCLUSION**

25 For the reasons explained above, the bankruptcy court did
26 not err in denying AMH's motion to dismiss on eligibility
27 grounds, nor did it err in overruling AMH's objection to
28 confirmation. Accordingly, we AFFIRM.