

MAR 27 2017

SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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. NV-16-1099-KuLJu
)
 ROBERT COOPER BROWN, III and) Bk. No. 3:15-bk-51542
 LAURA ANN BROWN,)
)
 Debtors.)
)
)
 ROBERT COOPER BROWN, III;)
 LAURA ANN BROWN,)
)
 Appellants,)
)
 v.) **AMENDED MEMORANDUM***
)
 DAVID BEAVER; CATHERINE BEAVER,)
)
 Appellees.)
)

Argued and Submitted on February 24, 2017
at Las Vegas, Nevada

Filed - March 27, 2017

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

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearances: Christopher Burke argued for Appellants; Amy N. Tirre argued for Appellees.

Before: KURTZ, LAFFERTY and JURY, 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 **INTRODUCTION**

2 Robert and Laura Brown appeal from an order dismissing their
3 chapter 13¹ bankruptcy case with respect to Robert only.² The
4 bankruptcy court held that, at the time the chapter 13 petition
5 was filed, Robert's debt to David and Catherine Beaver was
6 noncontingent and liquidated in an amount that exceeded
7 § 109(e)'s eligibility limit for unsecured debt.

8 On appeal, the Browns argue that a settlement agreement the
9 parties entered into during the Browns' prior chapter 7 case
10 liquidated Robert's debt in the amount of \$171,000 and provided
11 for an increase of that debt to \$500,000 only upon the occurrence
12 of an extrinsic event (Robert's uncured default in making
13 settlement payments). Because this supposed triggering event did
14 not occur before the Browns commenced their chapter 13 case,
15 Robert contends only the lesser amount of \$171,000 (less
16 settlement payments made) should have been counted against the
17 § 109(e) unsecured debt eligibility limit.

18 We disagree with the Browns' interpretation of the
19 settlement. Under the only reasonable interpretation of the
20 settlement, the Beavers held a noncontingent claim against Robert
21 liquidated in the amount of \$500,000 (less settlement payments
22 made) - an amount that exceeded the § 109(e) unsecured debt
23

24 ¹Unless specified otherwise, 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
27 Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

28 ²For ease of reference, we refer to Robert by his first
name. No disrespect is intended.

1 eligibility limit.

2 Therefore, we AFFIRM.

3 **FACTS**

4 The dispute between Robert and the Beavers began over
5 fifteen years ago when, according to the Beavers, Robert failed
6 to build them a house as contracted and allegedly used the
7 construction funds for his own purposes. In 2004, the parties
8 reached a settlement in the ensuing state court litigation
9 pursuant to which "Brown promised to complete construction of
10 the Beavers' home within two years, at no further cost to
11 Beavers." Third Amended Complaint (Feb. 23, 2011) at ¶ 46; see
12 also Answer to Third Amended Complaint (Feb. 13, 2012) at ¶ 1
13 (admitting ¶ 46 of the complaint).³

14 Several years later, the parties reached a further impasse,
15 so the Beavers returned to the state court with an amended
16 complaint alleging a new cause of action for breach of the
17 settlement agreement. In 2010, the state court entered an order
18 granting the Beavers partial summary adjudication, which did not
19 determine Robert's liability but did determine that the damages
20 arising from Robert's failure to build the Beavers' home per the
21 settlement agreement amounted to \$626,568.66, "plus other sums to
22 be determined at trial." Third Amended Complaint (Feb. 23, 2011)
23 at ¶ 51; see also Answer to Third Amended Complaint (Feb. 13,

24
25 ³These early facts are drawn from allegations that Robert
26 admitted in the Beavers' nondischargeability adversary proceeding
27 (Adv. No. 11-05002) against Robert in the Browns' first
28 bankruptcy case, District of Nevada Bankruptcy Case No. 10-54665.
The same facts are recited in the Stipulation for Entry of
Nondischargeable Judgment executed by the parties and approved by
court order in 2012.

1 2012) at ¶ 1 (admitting ¶ 51 of the complaint).

2 In November 2010, on the same day the state court trial was
3 scheduled to commence, the Browns commenced their chapter 7
4 bankruptcy case. The Beavers removed the state court lawsuit to
5 the bankruptcy court and, with leave of court, filed their third
6 amended complaint, which effectively converted that lawsuit into
7 a nondischargeability action on multiple grounds.

8 Nearly two years later, in 2012, the parties reached a new
9 settlement. This second settlement provided for Robert to make
10 15 years of payments in the aggregate sum of \$171,000. The
11 second settlement further provided that, if Robert defaulted on
12 the payments or on his other obligations and did not cure the
13 default within ten days of receipt of written notice of the
14 default, the Beavers could cause to be entered and enforced a
15 \$500,000 stipulated nondischargeable judgment.

16 If Robert had timely made all of the required settlement
17 payments, the Beavers would have been required under the second
18 settlement to file a "Satisfaction of Nondischargeable Judgment"
19 and were prohibited from entering the \$500,000 stipulated
20 nondischargeable judgment. But Robert defaulted on the required
21 settlement payments, and the Beavers sent Robert the requisite
22 notice of default.

23 Before the cure period ran, the Browns filed their
24 chapter 13 bankruptcy petition in late 2015. Shortly thereafter,
25 in January 2016, the Beavers filed a motion seeking relief from
26 the automatic stay to permit entry of the \$500,000
27 nondischargeable judgment against Robert and seeking the
28 dismissal of the case based on the debtors' chapter 13

1 ineligible under § 109(e).⁴

2 Pursuant to the second settlement agreement, the Beavers
3 asserted that Robert owed them \$500,000 (less \$9,000 in
4 settlement payments made), so Robert's unsecured debt exceeded
5 the \$383,175 unsecured debt eligibility limit. In response,
6 Robert argued that, at the time he and his wife filed their
7 chapter 13 petition, he only owed \$171,000 (less settlement
8 payments made).

9 The bankruptcy court disagreed with Robert. As a
10 preliminary matter, the court noted that it had presided over the
11 settlement conference between the parties in the Brown's prior
12 chapter 7 case, that it also had presided over the hearing on the
13 motion seeking approval of the second settlement, that it had
14 signed the order approving the second settlement agreement and
15 that it had reviewed the transcript from the settlement
16 conference, at which time it had stated on the record, on behalf
17 of the parties, the principal settlement terms.

18 According to the court, the settlement provided for fifteen
19 years of graduated payments totaling \$171,000, "[b]ut the amount
20 of the debt was clearly \$500,000, which would be reduced to
21 [\$171,000] only if the \$171,000 was actually paid." Hr'g Tr.
22 (March 17, 2016) at 5:5-7. Alternately stated, the court
23 determined that, under the settlement agreement, "[t]here was a
24 \$500,000 non-dischargeable obligation that could be reduced to
25

26 ⁴Whereas the Beavers initially sought dismissal against both
27 debtors, the bankruptcy court denied without prejudice the motion
28 to dismiss as against Robert's wife Laura. That ruling is not at
issue in this appeal.

1 \$171,000 so long as the debtor, Mr. Brown, complied with the
2 [payment] terms of the second settlement” Hr’g Tr.
3 (March 17, 2016) at 16:2-4. In so determining, the court further
4 concluded that the debt was neither contingent nor unliquidated
5 at the time of the Browns’ chapter 13 bankruptcy filing.

6 The bankruptcy court entered its order dismissing Robert
7 from the chapter 13 case on March 30, 2016, and the Browns timely
8 appealed.

9 **JURISDICTION**

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b) (2) (A), and we have jurisdiction under
12 28 U.S.C. § 158.

13 **ISSUE**

14 Did the bankruptcy court commit reversible error when it
15 held that, at the time of the Browns’ chapter 13 petition filing,
16 Robert was obligated to the Beavers for a liquidated and non-
17 contingent debt in excess of the chapter 13 unsecured debt
18 eligibility limit?

19 **STANDARDS OF REVIEW**

20 The meaning of the statutory terms “liquidated” and
21 “noncontingent” is a question of law we review de novo. Nicholes
22 v. Johnny Appleseed (In re Nicholes), 184 B.R. 82, 86 (9th Cir.
23 BAP 1995). Whether a particular debt fits within the statutory
24 terms for debt eligibility purposes similarly is a question of
25 law reviewed de novo. Id.; see also Guastella v. Hampton
26 (In re Guastella), 341 B.R. 908, 915 (9th Cir. BAP 2006)
27 (“Whether a debt is liquidated involves an interpretation of the
28 Bankruptcy Code and is reviewed de novo.”).

1 Both parties urge that the contingency and liquidation
2 issues turn on the correct interpretation of the settlement
3 agreement. For interpretation purposes, settlement agreements
4 are treated like contracts and generally are reviewed de novo.
5 See Commercial Paper Holders v. Hine (In re Beverly Hills
6 Bancorp), 752 F.2d 1334, 1338 (9th Cir. 1984); Pekarsky v.
7 Ariyoshi, 695 F.2d 352, 354 & n.1 (9th Cir. 1982); Kittitas
8 Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d
9 95, 98 (9th Cir. 1980); see also NGA # 2 Ltd. Liab. Co. v. Rains,
10 946 P.2d 163, 167 (Nev. 1997) (stating that construction of
11 contractual terms is a question of law).

12 We can affirm the bankruptcy court's ruling on any ground
13 supported by the record. Wirum v. Warren (In re Warren),
14 568 F.3d 1113, 1116 (9th Cir. 2009).

15 **DISCUSSION**

16 This appeal for the most part turns on a single issue:
17 whether, at the time of the Browns' chapter 13 bankruptcy filing,
18 Robert's debt to the Beavers was noncontingent and liquidated in
19 an amount that exceeded the chapter 13 eligibility limit for
20 unsecured debt. At the time of the Browns' chapter 13 filing,
21 the applicable version of § 109(e) provided as follows:

22 Only an individual with regular income that owes, on
23 the date of the filing of the petition, noncontingent,
24 liquidated, unsecured debts of less than \$383,175 and
25 noncontingent, liquidated, secured debts of less than
26 \$1,149,525, or an individual with regular income and
27 such individual's spouse, except a stockbroker or a
28 commodity broker, that owe, on the date of the filing
of the petition, noncontingent, liquidated, unsecured
debts that aggregate less than \$383,175 and
noncontingent, liquidated, secured debts of less than
\$1,149,525 may be a debtor under chapter 13 of this
title.

1 (Footnote Omitted.)

2 While the terms noncontingent and liquidated are not defined
3 in the statute, the Ninth Circuit Court of Appeals has given them
4 fixed meanings. "A claim is 'contingent' when 'the debtor will
5 be called upon to pay [it] only upon the occurrence or happening
6 of an extrinsic event which will trigger the liability of the
7 debtor to the alleged creditor,'" and "[a] claim is
8 'unliquidated' when it is not 'subject to ready determination and
9 precision in computation of the amount due.'" Picerne Constr.
10 Corp. v. Castellino Villas, A. K. F. LLC (In re Castellino
11 Villas, A. K. F. LLC), 836 F.3d 1028, 1033 (9th Cir. 2016)
12 (citing Fostvedt v. Dow (In re Fostvedt), 823 F.2d 305, 306 (9th
13 Cir. 1987)).

14 Before we consider whether Robert's debt falls within the
15 definition of these terms, we first must resolve a threshold
16 issue. Generally speaking, chapter 13 eligibility "should
17 normally be determined by the debtor's originally filed
18 schedules, checking only to see if the schedules were made in
19 good faith." Scovis v. Henrichsen (In re Scovis), 249 F.3d 975,
20 982 (9th Cir. 2001). In Scovis, the Court of Appeals reversed a
21 decision of this panel regarding chapter 13 eligibility because
22 we did not adhere to this rule. Id. Nonetheless, the Scovis
23 rule is not absolute. Scovis acknowledged that, when the good
24 faith of the debtors in filing their schedules is challenged, the
25 bankruptcy court can consider evidence beyond the schedules.
26 Id.; see also In re Guastella, 341 B.R. at 918-21 (applying good
27 faith exception and looking beyond schedules to determine that
28 debtor improperly listed debt at \$0 for eligibility purposes).

1 More importantly, although it enunciated a simple rule, that
2 the schedules govern for purposes of determining eligibility,
3 Scovis also recognized an important exception: the schedules do
4 **not** govern when it is clear to a legal certainty that a different
5 result should obtain. Scovis, 249 F.3d at 983-84. In Scovis,
6 one of the scheduled claims at issue was secured by a lien
7 **potentially** avoidable as an impairment of the Scovis's homestead
8 exemption. Id. Scovis held that it was appropriate to depart
9 from the schedules' listing of the claim as secured because the
10 effect of the scheduled homestead exemption on the scheduled
11 secured claim was "readily ascertainable" and was subject to "a
12 sufficient degree of certainty." Id. at 984.

13 In a similar vein, we do not construe Scovis as requiring
14 the bankruptcy court, in reading the schedules for eligibility
15 purposes, to ignore what it knows based on prepetition events
16 that occurred before the same bankruptcy court in a prior
17 bankruptcy case. In the parlance of Scovis, if the undisputed
18 occurrence of events during the prior bankruptcy case: (1) are
19 "readily ascertainable"; (2) are subject to "a sufficient degree
20 of certainty"; and (3) unequivocally establish that the claims as
21 scheduled are wrong, then the bankruptcy court should not be
22 bound to the face of the schedules for purposes of determining
23 the debtors' chapter 13 eligibility.

24 Our reading of Scovis is bolstered by its observation -
25 distilled from Comprehensive Accounting Corp. v. Pearson
26 (In re Pearson), 773 F.2d 751, 756-57 (6th Cir. 1985) - that the
27 rule for determining § 109(e) eligibility "is similar in nature
28 to the subject matter jurisdiction context for purposes of

1 determining diversity jurisdiction." Scovis, 249 F.3d at 982.
2 Discussing the test for determining the amount in controversy in
3 the diversity jurisdiction context, the Supreme Court in St. Paul
4 Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-90 (1938),
5 articulated a test analogous to the Scovis test used in
6 chapter 13 cases. Under the St. Paul Mercury test, as restated
7 in Pearson, "the amount claimed in good faith by the plaintiff
8 controls **unless it appears to a legal certainty** that the claim is
9 for less than the jurisdictional amount or the amount claimed is
10 merely colorable." Pearson, 773 F.2d at 757 (emphasis added)
11 (citing St. Paul Mercury, 303 U.S. at 288-90).

12 As more fully explained in St. Paul Mercury:

13 [I]f, from the face of the pleadings, it is apparent,
14 to a legal certainty, that the plaintiff cannot recover
15 the amount claimed **or if, from the proofs, the court is**
16 **satisfied to a like certainty that the plaintiff never**
17 **was entitled to recover that amount**, and that his claim
18 was therefore colorable for the purpose of conferring
19 jurisdiction, the suit will be dismissed. Events
20 occurring subsequent to the institution of suit which
21 reduce the amount recoverable below the statutory limit
22 do not oust jurisdiction.

23 303 U.S. at 288-90 (emphasis added).⁵

24 ⁵Some courts have characterized the legal certainty
25 exception to following the schedules as being subsumed within the
26 good faith inquiry. See, e.g., In re Smith, 419 B.R. 826, 829
27 (Bankr. C.D. Cal. 2009), aff'd in part, 435 B.R. 637 (9th Cir.
28 BAP 2010) ("Bad faith, in this context, exists when it appears to
a legal certainty that the claim is not what the debtor
reported."). But we think it is more faithful to Scovis, Pearson
and St. Paul Mercury to conceive of the legal certainty exception
as a separate and independent inquiry that may affect whether it
is appropriate to accept at face value the debtor's schedules for
§ 109(e) eligibility purposes. As this panel determined in its
decision affirming in part the Smith bankruptcy court's ruling,
(continued...)

1 Indeed, when a rule of law would make it "virtually
2 impossible" for the plaintiff to establish the requisite amount
3 in controversy, the legal certainty rule permits the court to
4 depart from the amount of damages alleged in the plaintiff's
5 complaint. See Pachinger v. MGM Grand Hotel-Las Vegas, Inc.,
6 802 F.2d 362, 364 (9th Cir. 1986). And the court "may go beyond
7 the pleadings for the limited purpose of determining the
8 applicability of the rule [of law]." Id.

9 Returning to the undisputed facts in the record before the
10 bankruptcy court here, those facts established that Robert and
11 the Beavers entered into the second settlement agreement which
12 fixed the amount of Robert's nondischargeable obligation to the
13 Beavers. Thus, figuring the amount and status of Robert's debt
14 at the time of the Browns' chapter 13 bankruptcy filing is a
15 relatively straightforward matter of construing the parties'
16 rights and liabilities under the second settlement agreement.

17 We apply Nevada law in interpreting the second settlement
18 even though the agreement was brokered and approved in a
19 bankruptcy court. See Cannon v. Haw. Corp. (In re Haw. Corp.),
20 796 F.2d 1139, 1143 (9th Cir. 1986); Commercial Paper Holders v.
21 Hine (In re Beverly Hills Bancorp), 649 F.2d 1329, 1332-33 (9th
22 Cir. 1981). Under Nevada law, our contract interpretation
23 efforts must strive to give effect to the parties' intended
24 meaning as manifested by the contract's express terms. Galardi

25
26 ⁵(...continued)
27 the "principle of certainty" may apply even if the debtor's good
28 faith in filing its schedules has not been challenged. 435 B.R.
at 646-47.

1 v. Naples Polaris, LLC, 301 P.3d 364, 367-69 (Nev. 2013);
2 Campanelli v. Conservas Altamira, S.A., 477 P.2d 870, 872 (Nev.
3 1970). That meaning typically is derived from the terms the
4 parties chose and in light of the context in which the terms were
5 used. Galardi, 301 P.3d at 367; see also Mohr Park Manor, Inc.
6 v. Mohr, 424 P.2d 101, 105 (Nev. 1967) ("A court should ascertain
7 the intention of the parties from the language employed as
8 applied to the subject matter in view of the surrounding
9 circumstances."). The ordinary and reasonable meaning of
10 contract terms is preferred. Galardi, 301 P.3d at 368.

11 Here, the patent meaning of the parties' settlement
12 agreement terms is straightforward. By way of the second
13 settlement, the parties sought to fully and finally resolve the
14 questions regarding Robert's liability to the Beavers and
15 regarding the nondischargeability of that debt. If Robert timely
16 paid all of the required settlement payments in the aggregate
17 amount of \$171,000, his obligations to the Beavers would be
18 treated as fully satisfied. On the other hand, if Robert
19 defaulted on his settlement payments - and did not timely cure
20 the default - the Beavers were entitled to have entered against
21 Robert a judgment for \$500,000 in nondischargeable debt (less any
22 settlement payments made).

23 There is only one reasonable interpretation of these
24 settlement agreement terms. By way of the second settlement, the
25 parties agreed that Robert's debt to the Beavers would be
26 nondischargeable in the amount of \$500,000, subject to a
27 condition subsequent: if Robert timely paid the \$171,000 in
28 settlement payments, the entire nondischargeable obligation would

1 be deemed satisfied. The concept of a condition subsequent - a
2 specific subsequent event that can extinguish a prior binding
3 contractual obligation - is recognized under Nevada law. See,
4 e.g., Am. Bank Stationery v. Farmer, 799 P.2d 1100, 1102 (Nev.
5 1990); Prudential Ins. Co. of Am. v. Lamme, 425 P.2d 346, 348
6 (Nev. 1967).

7 The Browns contend on appeal that Robert's nondischargeable
8 obligation of \$500,000 was not subject to a condition subsequent
9 but rather was subject to a condition precedent: an uncured
10 default in settlement payments. We reject this interpretation of
11 the second settlement as unreasonable. The Browns point to the
12 settlement term providing for the entry of a \$500,000
13 nondischargeable judgment only upon the occurrence of an uncured
14 default. However, this settlement term on its face deals with
15 enforcement of the debt and not with its creation.

16 More importantly, the Browns' posited interpretation of the
17 second settlement and their contention that the \$500,000 debt was
18 subject to a condition precedent is unreasonable because it would
19 render invalid one of the key terms of the settlement - the term
20 providing for entry of the \$500,000 nondischargeable judgment.
21 Under Nevada law, a contractual term providing for a \$500,000
22 debt as a consequence for not timely paying a \$171,000 obligation
23 typically would constitute an unenforceable penalty. See
24 generally Hubbard Bus. Plaza v. Lincoln Liberty Life Ins. Co.,
25 649 F.Supp. 1310, 1316-17 (D. Nev. 1986), aff'd, 844 F.2d 792
26 (Mem. Dec.) (9th Cir. April 4, 1988) (applying Nevada law and
27 holding that a so-called liquidated damages provision constituted
28 an unenforceable penalty when the adverse party demonstrated that

1 the agreed liquidated damages were disproportionate with the
2 actual damages suffered by the proponent).

3 Nevada law requires us to prefer a contract interpretation
4 that renders the contract's terms lawful, valid and enforceable.
5 Mohr, 424 P.2d at 104-05; see also Restatement (Second) of
6 Contracts § 203(a) (1981). By interpreting the timely payment of
7 the \$171,000 in settlement payments as a condition subsequent
8 that would extinguish the entire, pre-existing \$500,000
9 obligation, we comply with this contract construction
10 requirement.

11 Accordingly, on the date of the Browns' chapter 13
12 bankruptcy filing, the Beavers held a noncontingent claim
13 liquidated in the amount of \$500,000 (less \$9,000 in settlement
14 payments made). This claim was not subject to a contingency
15 within the meaning of § 109(e) because the parties to the second
16 settlement did not contemplate that any further act or event was
17 necessary to trigger the liability. In re Fostvedt, 823 F.2d at
18 306-07. By its very nature, the condition subsequent was not
19 necessary to trigger the liability. Thus, the liquidated amount
20 of this noncontingent debt exceeded the § 109(e) eligibility
21 limits for unsecured debt, and the bankruptcy court correctly
22 determined that Robert was ineligible to be a chapter 13 debtor.

23 **CONCLUSION**

24 For the reasons set forth above, the bankruptcy court's
25 order dismissing Robert's chapter 13 bankruptcy case is AFFIRMED.