UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PENNY D. GOUDELOCK, Appellant, v. SIXTY-01 ASSOCIATION OF APARTMENT OWNERS, Appellee.	CASE NO. C15-1413-MJP ORDER AFFIRMING BANKRUPTCY COURT

THIS MATTER comes before the Court on Debtor-Appellant Penny D. Goudelock's appeal of the bankruptcy court's grant of summary judgment in Appellee's favor. (Dkt. Nos. 1, 5.) Having considered the Parties' briefing and the related record, the Court AFFIRMS the bankruptcy court's determination.

Background

This is an appeal of the bankruptcy court's order granting summary judgment in favor of Plaintiff-Appellee Sixty-01 Association of Apartment Owners in Adversary Proceeding No. 15-01093. (Dkt. Nos. 1, 2, 4.) Sixty-01 Association of Apartment Owners ("Sixty-01") brought the

adversary proceeding to determine whether Ms. Goudelock's post-petition condominium association dues and assessments were dischargeable under 11 U.S.C. § 1328(a). The relevant factual background can be summarized as follows.

In 2001, Ms. Goudelock purchased a condominium subject to a declaration of covenants and restrictions (the "Declaration") recorded against the property in 1978, which provided for, inter alia, the creation of Sixty-01, a Washington non-profit condominium association existing under RCW 64.38. (Dkt. No. 5-1 at 52-54.) To fund Sixty-01's activities, the Declaration provided that Sixty-01 could charge each lot owner monthly dues as well as other assessments as needed for maintenance, repair, and capital improvements. (Id. at 60-127.) Additionally, the Declaration granted Sixty-01 a lien on each lot for unpaid assessments as well as costs and reasonable attorney's fees incurred in connection with the collection of any delinquent assessments. (Id.)

By 2009, Ms. Goudelock was not paying her dues and assessments, and Sixty-01 commenced foreclosure proceedings against Ms. Goudelock in King County Superior Court. (Id. at 48-50, 146-51, 164-65.) Ms. Goudelock moved out of the property and, on March 11, 2011, filed for relief under Chapter 13 of the Bankruptcy Code. (Id.) Because Ms. Goudelock was no longer living in the condominium, she proposed an amended Chapter 13 plan in June 2011 that surrendered the property. (Id. at 167-70.) The proposed plan was confirmed by the bankruptcy court on October 3, 2011. (Id. at 157.)

Before the plan was confirmed by the court, Sixty-01 had obtained relief from the stay based on its intention to pursue its in rem foreclosure rights against the property alone. (Id. at 48-50.) However, Sixty-01 canceled the sheriff's sale in December of 2012 because the mortgage lenders paid all of Ms. Goudelock's outstanding dues and assessments. (Id.) The

property then sat empty until February 26, 2015, when the successor in interest to Litton Loan Servicing foreclosed on the property. (Id. at 48-50, 56-57.) On July 24, 2015, Ms. Goudelock completed her plan obligations and received a Chapter 13 discharge. (Id. at 160-63.)

Relying principally on In re Foster, 435 B.R. 650 (B.A.P. 9th Cir. 2010), the bankruptcy court found that Ms. Goudelock's post-petition condominium association dues and assessments were not dischargeable because they arose at the time of their assessment and were an incidence of legal ownership of the burdened property, thus rejecting Ms. Goudelock's contention that the dues and assessments were pre-petition debts. (Dkt. No. 5-1 at 186-87,196-204.) Specifically, the bankruptcy court held that the discharge granted to Ms. Goudelock did not discharge the dues and assessments that accrued between March 11, 2011, the date Ms. Goudelock filed her bankruptcy petition, and February 26, 2015, the date the lender foreclosed on the property. (Id.) Ms. Goudelock now appeals, arguing again that the post-petition dues and assessments arose out of a pre-petition agreement and are therefore "debts" dischargeable under 11 U.S.C. § 1328(a). (Dkt. No. 5 at 6.) Ms. Goudelock also argues that, to the extent the laws of Washington State prevent Ms. Goudelock from discharging the dues and assessments, those laws infringe on the "fresh start" to be provided to debtors under the Bankruptcy Code and are thus preempted by federal law. (Id.)

The Court now finds that Ms. Goudelock's post-petition condominium association dues and assessments are not dischargeable, and thus AFFIRMS the bankruptcy court's grant of summary judgment in Sixty-01's favor.

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Discussion

I. Legal Standard

A grant of summary judgment by the bankruptcy court is reviewed de novo. In re Bullion Reserve of N. Am., 922 F.2d 544, 546 (9th Cir. 1991). "Where the facts in the record are not in significant dispute, our task is to determine whether a legal conclusion is contrary to law." In re Bubble Up Delaware, Inc., 684 F.2d 1259, 1262 (9th Cir. 1982). The bankruptcy court's interpretation of the Bankruptcy Code is reviewed de novo. In re Been, 153 F.3d 1034, 1036 (9th Cir. 1998).

II. Dischargeability under § 1328(a)

The Court below relied on the Bankruptcy Appellate Panel of the Ninth Circuit's decision in In re Foster, 435 B.R. 650 (B.A.P. 9th Cir. 2010), to conclude that Ms. Goudelock's post-petition dues were not dischargeable. (Dkt. No. 5-1 at 186-87,196-204.) Foster and its progeny hold that as a matter of law, nondischargeable liability for condominium association dues and assessments stemming from a real covenant continues to accrue "as long as [the debtor] maintains [her] legal, equitable or possessory interest in the property and is unaffected by [her] discharge." Foster, 435 B.R. at 661 (emphasis added); In re Batali, 2015 WL 7758330, *4-9 (B.A.P. 9th Cir. Dec. 1, 2015). In adopting this rule, the Foster court rejected the approach used by the court in In re Rosteck, 899 F.2d 694 (7th Cir. 1990), finding the approach used by the court in In re Rosenfeld, 23 F.3d 833 (4th Cir. 1994) to be more persuasive considering Washington's property laws, to be consistent with the Restatement (Third) of Property, and to better account for the distinction between the treatment of property rights and contract rights under the Bankruptcy Code. Foster, 435 B.R. at 660-61.

The Foster rule provides a clear answer here: Ms. Goudelock's post-petition dues and assessments are not dischargeable. While Ms. Goudelock moved out of and surrendered her condominium as part of her Chapter 13 plan, she retained legal ownership of the condominium until the lender foreclosed on it on February 26, 2015. (See Dkt. No. 5-1 at 135, 164-65.) Opting to "surrender" a property under the Bankruptcy Code "does not transfer ownership of the surrendered property. Rather, 'surrender' means only that the debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral." In re Batali, 2015 WL 7758330 at *9 (quoting In re Rosa, 495 B.R. 522, 523 (Bankr. D. Haw. 2013)). In other words, "[a]uthorization for surrender does not constitute a transfer of title." In re Gollnitz, 456 B.R. 733, 736 (Bankr. W.D.N.Y. 2011). Subject to exceptions not applicable here, under Washington law, "[e]very conveyance of real estate, or any interest therein ... shall be by deed[.]" RCW § 64.04.010. To qualify as a deed, an instrument must comply with RCW § 64.04.020, which requires that "[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds." The confirmed Amended Plan does not substitute for a deed.

Accordingly, the court below found that because title was not transferred until foreclosure in 2015, Ms. Goudelock retained her legal interest in the property until that date. (Dkt. No. 5-1 at 186-87,196-204.) The court below concluded that because post-petition dues are not dischargeable "as long as [the debtor] maintains [her] legal, equitable or possessory interest in the property," the dues and assessments were not dischargeable here. (Id.)

Ms. Goudelock urges the Court to reject the Foster rule based on In re Rosenfeld, 23 F.3d 833 (4th Cir. 1994) and instead adopt a rule based on, inter alia, the decisions in In re Rosteck,

899 F.2d 694 (7th Cir. 1990), and In re Mattera, 203 B.R. 565 (Bankr. D.N.J. 1997). (Dkt. No. 5 at 20.) In those cases, the courts found that a plain reading of 11 U.S.C. § 101's definition of "claim" lead to the conclusion that post-petition dues and assessments are contingent, unfixed, unmatured rights to payment, and are thus "debts" dischargeable under § 1328(a). Rosteck, 899 F.2d at 696, Mattera, 203 B.R. at 571-72. Ms. Goudelock also argues that to the extent Washington's property law allows condominium associations, as creditors, "to collect on the unsecured portion of a lien after foreclosure," it conflicts with the Bankruptcy Code and is preempted under the doctrine of field preemption. (Dkt. Nos. 5 at 10-16, 9-1 at 6-13.)

This Court agrees with the Bankruptcy Appellate Panel of the Ninth Circuit's decision to adopt the Rosenfeld approach. The Declaration giving rise to the dues and assessments in this case is a covenant running with the land, a property right; while a debtor's personal obligation under a contract may be discharged in most instances, the "bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation." In re Rivera, 256 B.R. 828, 834 (Bankr. M.D. Fla. 2000) (quoting United States v. Sec. Indus. Bank, 459 U.S. 70, 75 (1982)). As the Foster court noted, under Washington law, the obligation to pay condominium or homeowners' association dues "is a function of owning the land with which the covenant runs and not from a prepetition contractual obligation." Foster, 435 B.R. at 660; Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower Condo. Ass'n, 124 Wn. App. 178, 188 (2004) (declaration is "not a contract," but "a document that unilaterally creates a type of real property"); see also Butner v. United States, 440 U.S. 48, 54 n.9, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an

interested party is involved in a bankruptcy proceeding," even though this "may lead to different results in different States.").

Ms. Goudelock argues that this reasoning ignores the intentionally broad definition of the term "claim." (Dkt. No. 5 at 16-22.) But, as court in Rivera explained, "[a]t the core of the Section 101(5) definition of 'claim' is the term 'right to payment.' The key to distinguishing a right to payment that is or is not subject to . . . discharge is simply whether the right to payment is based on a property interest or something else." Rivera, 256 B.R. at 833. "Any release from a covenant would in effect be a forced conveyance of a property interest from the [condominium] association to the debtor." Id. at 834. Ms. Goudelock's efforts to characterize the post-petition dues and assessments as contractual obligations—rather than liabilities arising from a property interest held by Sixty-01 and stemming from Ms. Goudelock's continued legal ownership of the condominium—are unavailing.

Ms. Goudelock's preemption arguments are somewhat opaque, but appear to be based on the contention that if Washington's Condominium Act, RCW 64.34, "prevails in this matter, post-petition Condo Association dues would be subject to collection on an unsecured deficiency after a foreclosure while a chapter 13 debtor is in bankruptcy, impeding the debtor's fresh start." (Dkt. No. 5 at 12.) RCW 64.34.364(11) provides in relevant part that "the foreclosure of a mortgage does not relieve the prior owner of personal liability for assessments accruing against the [condominium] unit prior to the date of such sale." To the extent this contention forms the basis for Ms. Goudelock's preemption argument, it evinces a serious misunderstanding of the state property law relied on by the Foster court. As discussed above, the Foster court based its decision on Washington's law as to real covenants, and the interaction of the law regarding covenants with the Bankruptcy Code. In other words, even if the Condominium Act, RCW

64.34.364(11), were preempted, Ms. Goudelock's post-petition dues and assessments would still be nondischargeable under Foster's reasoning.

Finally, Ms. Goudelock's argument about congressional silence as to the applicability of 11 U.S.C. § 523(a)(16) is similarly unavailing. As the Ninth Circuit has noted, "attempt[ing] to divine congressional intent from congressional silence" is "an enterprise of limited utility that offers a fragile foundation for statutory interpretation." Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 717 (9th Cir. 2004); see also Brown v. Gardner, 513 U.S. 115, 121 (1994) ("congressional silence lacks persuasive significance") (citations and internal quotation marks omitted).

In sum, the Court finds that Ms. Goudelock's liability for the condominium association dues and assessments stemmed from her legal ownership of the condominium and the property rights held by Sixty-01 via the Declaration, not from a pre-petition contract. As such, the post-petition dues and assessments are not dischargeable and continued to accrue for as long as Ms. Goudelock maintained a legal, equitable, or possessory interest in the property, i.e., until February 26, 2015. The bankruptcy court's grant of summary judgment in Sixty-01's favor is therefore AFFIRMED.

Conclusion

The bankruptcy court's grant of summary judgment in Sixty-01's favor is AFFIRMED. The clerk is ordered to provide copies of this order to all counsel.

Dated this 6th day of April, 2016.

Marsha J. Pechman
United States District Judge