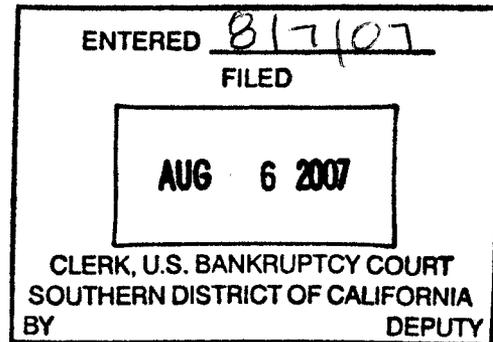


1 WRITTEN DECISION - NOT FOR PUBLICATION



9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 07-01353-B13
12)
13 EDBERT V. FREDELUCES, and) ORDER ON TRUSTEE'S
14 ROWENA M. FREDELUCES,) OBJECTION TO CONFIRMATION
15) OF CHAPTER 13 PLAN
16 Debtors.)
17)

18 As explained in this Court's Order entered July 16, 2007 in
19 this case, the trustee contends debtors are not eligible to be
20 Chapter 13 debtors because their debt limits exceed the ceilings
21 on eligibility set out in 11 U.S.C. § 109. In that Order, the
22 Court invited the parties to submit supplemental briefing on the
23 question whether debtors can be liable on the promissory note
24 under California's anti-deficiency statutory regimen. Both
25 parties have done so.

26 The Chapter 13 Trustee has reiterated his position that so
long as the creditor can waive its right to foreclose and sue on
the promissory note, the debtors are liable on the note even
though they no longer are on title on the real property

1 collateral. Debtors would therefore be unsecured creditors and
2 the amount of their debt exceeds the § 109 ceiling for unsecured
3 debt. The trustee also continues to assert that the debtors'
4 liability is not contingent as that word is used in § 109 because
5 there is nothing in the promissory note that makes debtors'
6 liability on it contingent on some future event which may or may
7 not occur.

8 The Court agrees that debtors' liability on the note is not
9 contingent within the meaning of § 109. However, the Trustee has
10 not addressed the question of whether debtors are liable at all
11 on the promissory note in the face of California's statutory
12 anti-deficiency scheme. As noted in the July 16 Order, it
13 appears that if the promissory note is a purchase money
14 obligation for a residence for four or fewer families § 580b of
15 the California Code of Civil Procedure provides there can be no
16 deficiency judgment. Section 726 of the same Code requires
17 creditors to look first to their collateral. As stated by the
18 court in In re Prestige Limited Partnership-Concord, 223 B.R.
19 203, 210 (Bankr. N.D. CA 1998):

20 Because of the substantive importance of
21 §§ 726 and 580b, a creditor cannot circumvent
22 the requirement of looking to the security
first by "waiving" the security and suing the
debtor directly on the debt.

23 This case involves a very unusual situation where debtors
24 transferred title to the real property but did not get relieved
25 of their obligation under the promissory note. Nothing has been
26 offered to controvert debtors' contention that the note was a

1 purchase money obligation incurred in acquiring a residential
2 property for four or fewer families. It appears they cannot be
3 liable on the note under any circumstances, so the note should
4 not be included in calculating their eligibility for Chapter 13
5 under 11 U.S.C. § 109. If the amount of the note is excluded
6 from the calculation, debtors are eligible to be Chapter 13
7 debtors under the rationale of In re Loya, 123 B.R. 338 (9th Cir.
8 BAP 1991).

9 For the foregoing reasons, the Chapter 13 Trustee's
10 objection to confirmation of debtors' proposed plan shall be, and
11 hereby is overruled.

12 IT IS SO ORDERED.

13 DATED: AUG - 6 2007

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15 
16 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court

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