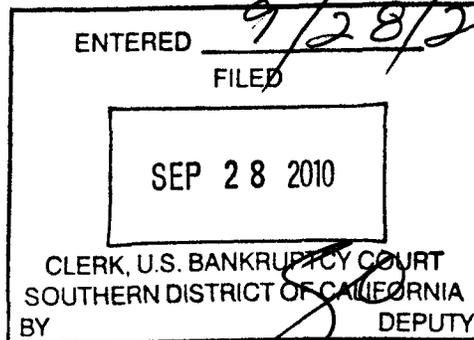


WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

11	In re)	Case No. 09-16609-JM13
)	
12	SERGIO A. JAZO and)	ORDER ON MOTION FOR
	ADRIANA JAZO,)	VALUATION OF RESIDENCE
13)	AND AVOIDANCE OF JUNIOR
	Debtors.)	TRUST DEED
14	_____)	

15 Debtors have moved to strip off the junior lien of
16 Washington Mutual on debtors' principal residence on the ground
17 that there is no value to which it attaches, therefore rendering
18 the debt unsecured pursuant to 11 U.S.C. § 506(a), and avoidable
19 through a Chapter 13 plan in accordance with 11 U.S.C. § 1322(b).

20 Debtors' motion has been unopposed. It was taken under
21 submission, however, because debtors previously received a
22 discharge in a Chapter 7 case on or about November 18, 2008.
23 Accordingly, they are not eligible for a discharge in this
24 Chapter 13 case pursuant to 11 U.S.C. § 1328(f). The question
25 at issue is, therefore, whether they are eligible to invoke the

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1 provisions of §§ 506(a) and 1322(b) to avoid the creditor's lien
2 when they cannot discharge the debt.

3 Debtors seek an order that would avoid the creditor's lien
4 upon successful completion of their Chapter 13 plan, even though
5 they are not eligible to discharge the debt the lien otherwise
6 secured. In a separate case, In re Burnett, 427 B.R. 517
7 (Bankr. S.D. CA 2010), this Court explained that the availability
8 or nonavailability of a discharge in a Chapter 13 is not an
9 element of eligibility to seek Chapter 13 relief under 11 U.S.C.
10 § 109. Because a debtor is not barred from eligibility to file
11 a Chapter 13 case after receiving a Chapter 7 discharge does not
12 mean debtor can earn a *de facto* discharge of a debt by completing
13 a plan without either paying the debt or receiving an actual
14 discharge.

15 As this Court stated in In re Casey, 428 B.R. 519 (Bankr.
16 S.D. CA 2010):

17 Under the Bankruptcy Code, there are two
18 ways to make an enforceable debt go away
19 permanently. One is to pay it, in full. The
other is to obtain a discharge of any
remaining obligation.

20 428 B.R. at 522. Here, debtors' plan does not propose to pay the
21 junior creditor in full. Perhaps the debtors would argue they
22 had no continuing liability on the unsecured remainder of the
23 debt because of their prior Chapter 7 discharge. Or, perhaps
24 they have some other theory for why they would have no continuing
25 liability on the unpaid balance of the debt they owe the
26 creditor. To the extent the debtors have something in mind along

1 those lines, the court disagrees, and will not sign a lien strip
2 order in a "Chapter 20" case that contains language that would
3 seem to permanently alter a creditor's rights other than by
4 payment in full without eligibility for a discharge. To be sure,
5 debtors may propose a plan, which may be found to be in good
6 faith, and thereby delay payment to a creditor during the life of
7 the plan. But they cannot make the debt go away other than by
8 payment in full or discharge, and discharge is not available in
9 this case.

10 In Casey, this Court stated:

11 A case that graphically illustrates the
12 foregoing is In re Lilly, 378 B.R. 232
13 (Bankr. C.D. IL 2007). That case was a
14 Chapter 20, and in the Chapter 13 the debtor
15 proposed to reduce the contract rate of
16 interest on a vehicle for the life of the
17 plan. There, the court observed:

18 Where a debtor does not receive a
19 discharge, however, any modifications
20 to a creditor's rights imposed in the
21 plan are not permanent and have no
22 binding effect once the term of the plan
23 ends. See In re Ransom, 336 B.R. 790
24 (9th Cir. BAP 2005) (post petition
25 interest on nondischargeable student
26 loan continued to accrue at the contract
rate and could be collected after
Chapter 13 case terminated); In re
Holway, 237 B.R. 217 (Bankr. M.D. Fla.
1999) (tax debt continued to accrue
interest and penalties postpetition
where debtor did not receive Chapter 13
discharge); In re Place, 173 B.R. 911
(Bankr. E.D. Ark. 1994) (where Chapter
13 case was dismissed without discharge,
accrual of interest on tax debt was not
affected by pendency of bankruptcy
case).

378 B.R. at 326. The Lilly Court concluded:

1 A debtor who files a Chapter 13 case
2 despite not being eligible for a discharge,
3 nevertheless has the power to modify a
4 secured creditor's rights under Section
5 1322(b)(2), and the power to pay the
6 creditor's claim with interest at the Till
7 rate under Section 1325(a)(B)(ii). Without a
8 discharge, however these modifications are
9 effective only for the term of the plan. The
10 DEBTOR remains liable for the full amount of
11 the underlying debt determined under
12 nonbankruptcy law, including her liability
13 for interest calculated at the contract rate.
14 If the interest rate reduction achieved under
15 a confirmed plan was determined to be
16 permanent and binding on the creditor, that
17 would result in a *de facto* discharge of a
18 portion of the underlying debt, a benefit to
19 which the DEBTOR is not entitled. Once the
20 plan is completed, the DEBTOR remains liable
21 for the balance of the "underlying debt
22 determined under nonbankruptcy law"

378 B.R. at 326-37.

428 B.R. at 522-23.

This Court, in the Casey decision, continued:

16 The Court's conclusion is buttressed by
17 a number of relevant decisions which have
18 looked at nondischargeable debts. In Bruning
19 v. United States, 376 U.S. 358 (1964), the
20 debtor had been assessed for prepetition
21 unpaid taxes. During bankruptcy a small
22 portion of the debt was paid on the IRS claim
23 pursuant to a proof of claim filed by the
24 IRS. The debtor acknowledged his liability
25 on the underlying debt but contended the IRS
26 could not seek postpetition interest on that
debt since it chose to file a claim and
receive a distribution. Writing for a
unanimous court, Chief Justice Warren wrote
that debtor's personal liability for
postpetition interest on the nondischargeable
debt remained the debtor's personal
obligation.

In re Pardee, 218 B.R. 916 (9th Cir. BAP
1998) involved a chapter 13 plan that

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Conclusion

As this Court explained in In re Casey, debtors in a "Chapter 20" are not precluded from filing a Chapter 13 just because they had received a Chapter 7 discharge within the preceding four years. Nor are they, as a matter of law, precluded from invoking the lien strip mechanism of §§ 506(a) and 1322(b). Whether such a plan is confirmable is for a confirmation hearing, as discussed in Casey. Therefore, the court will sign a lien strip order consistent with the foregoing, so long as it does not purport to permanently avoid or grant a *de facto* discharge of the underlying debt when debtors are not eligible for such a discharge under 11 U.S.C. § 1328(f).

IT IS SO ORDERED.

DATED: SEP 28 2010


PETER W. BOWIE, Chief Judge
United States Bankruptcy Court