Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
June 29, 2022

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 21-12657-MKN
	)	Chapter 7
ROLANDO RAMIL JALLORES GO	)	
aka ROLANDO RAMIL J. GO and	)	
CHERRY ANN MACAISA TIJAM	)	
aka CHERRY A.M. TIJAM	)	Date: January 12, 2022
aka CHERRY M. TIJAM,	)	Time: 2:30 p.m.
	)	
Debtors.	)	
	)	

ORDER ON MOTION FOR CONTEMPT FOR VIOLATION OF THE DISCHARGE INJUNCTION 11 U.S.C. §524(a)(2)[1]

On January 12, 2022, the court heard the Motion for Contempt for Violation of the Discharge Injunction 11 U.S.C. §524(a)(2) ("Contempt Motion"), brought in the above-captioned case.[2] The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" or "§§ 101-1532" are to the provisions of the Bankruptcy Code. All references to "FRE" are to the Federal Rules of Evidence. All references to "LR" are to the bankruptcy provisions of the Local Rules of Practice for the District of Nevada. All references to "NRS" are to the Nevada Revised Statutes.

[2] Debtors submitted 12 documents marked as Exhibits 1 through 12 ("Debtor Ex. ___") attached to the Contempt Motion and their reply ("Reply"). 21st Mortgage Corporation ("Lender") submitted 2 documents marked as Exhibits A and B ("Lender Ex. ___") attached to its opposition ("Opposition") to the Contempt Motion. Neither party in this proceeding objects to the court's consideration of any of the exhibits.

BACKGROUND[3]

On or about February 19, 2020, Rolando Ramil Jallores Go ("Rolando") and Cherry Ann Macaisa Tijam (jointly, "Debtors") purchased a manufactured home ("Residence"). The Residence is situated on real property that the Debtors do not own. To finance the purchase, they borrowed $62,918 from the Lender pursuant to a Consumer Loan Note, Security Agreement and Disclosure Statement ("Secured Note"). See Lender Ex. A. Title to the Residence is held by the Debtors as reflected in the Manufactured Home Title Information obtained from the Nevada Housing Division of the Department of Business and Industry ("Title Information"). See Lender Ex. B.

Under the Secured Note, Debtors are obligated to commence 276 monthly payments on April 1, 2020, in the amount of $530.57. The Secured Note includes a specific section in capitalized, bold type entitled "**DELINQUENCY AND DEFAULT**." Among other things, this section provides that a 5% late charge will be applied if any monthly payment is more than 15 days late. The Secured Note identifies five specific events of default as follows:

> Borrower will be in default under this Note if: (1) Borrower fails to make any payment when due; (2) Borrower otherwise fails to perform any of Borrower's obligations under this Note or under any mortgage or deed of trust which secures this Note; (3) Borrower dies or becomes legally unable to manage Borrower's affairs; (4) any statement of fact, representation or warranty Borrower makes to Lender in Borrower's application for credit, any other document submitted to Lender or signed by Borrower in connection with this Note, or in any Note document is false, misleading, inaccurate, or incomplete; or (5) Borrower files a petition in bankruptcy, or a party files a petition in bankruptcy against Borrower.

The fifth ground – a default based on the occurrence of an event such as a bankruptcy filing – is known as an "ipso facto" clause. See, e.g., In re Wright, 622 B.R. 779, 794 (Bankr. D. Ore. 2020) ("Although certain Code provisions limit the enforceability of contract clauses that put a party in default for filing for bankruptcy (ipso factor clauses), the Code lacks a general

[3] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned bankruptcy case. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

prohibition on their enforceability. In the context of chapter 7 cases affecting collateral not subject to an executory contract or unexpired lease (see § 365(e)(1)), the Code affirmatively states in § 521(d) that it does not affect an ipso facto clause's enforceability…").[4] The **DELINQUENCY AND DEFAULT** section also specifically provides as follows:

> In the event of Borrower's default, Lender will give Borrower notice of the default and right to cure the default ("Notice of Default"). Borrower is not entitled to a Notice of Default if Borrower abandons or voluntarily surrenders the Manufactured Home, or it other extreme circumstances exist.

The Secured Note further provides:

> If Borrower does not cure the default within 30 days after the postmarked date of the Notice of Default, or if a Notice of Default is not required to be sent, Lender may (1) accelerate the maturity date of the debt and require Borrower to pay Lender the entire remaining balance and all other amounts due under the Note, (2) require Borrower to make the Manufactured Home available to the Lender, (3) take legal action against the Borrower, (4) repossess the Manufactured Home, (5) enforce such rights and remedies available to Lender under the Uniform Commercial Code and other applicable law, and (6) foreclose on the real property, if applicable.

(Emphasis added.)

On May 24, 2021, Debtors filed a voluntary Chapter 7 petition to which they attached their Schedules of Assets and Liabilities ("Schedules"), Statement of Financial Affairs ("SOFA") and Statement of Intention for Individual Filing Under Chapter 7 ("Statement of Intention"). Notice of the Chapter 7 proceeding was given to all creditors, including Lender. On property Schedule "A/B," the Residence was listed as property of the bankruptcy estate. On Schedule "C," Debtors claimed the Residence as exempt. On Schedule "D," Lender was listed as a creditor secured by a first mortgage against the Residence. On their Statement of Intention, Debtors listed the Lender as being secured by the Residence and identified their intention to "Retain and pay current." No party in interest objected to the claimed exemptions. No party in

[4] The court in Wright goes on to state: "For the reasons outlined above, Debtors in this case have failed to satisfy § 521(a)(2) and paragraphs (1) and (2) of § 362(h). Thus, nothing under the Bankruptcy Code prevents or limits the operation of an ipso facto clause contained in Debtors' underlying agreements with [creditor]. § 521(d). As *Dumont* instructs, § 521(d) does not give [creditor] any additional substantive rights to the collateral; it simply 'removes the last remaining impediment under federal bankruptcy law to enforcement of an ipso facto clause that already exists.' 581 F.3d at 1115." 622 B.R. at 794.

interest objected to the Debtors' discharge or to dischargeability of any particular debt. No party in interest filed a proposed agreement to reaffirm any consumer debt.

On August 24, 2021, Debtors received their Chapter 7 discharge. (ECF No. 23).

On August 26, 2021, a Certificate of Notice was entered attesting that a copy of the Order of Discharge was transmitted to all creditors and parties in interest, including the Lender. (ECF No. 24).

On August 27, 2021, the Chapter 7 case was closed. (ECF No. 25).

On or about September 10, 2021, Lender sent Rolando a "Mortgage Statement" setting a payment due date of 10/1/2021 in the payment amount of $653.25. See Debtor Ex. 2. The Mortgage Statement acknowledged that the Lender has received a customer payment in the same amount on 9/8/2021. The Mortgage Statement also includes an information box entitled "Bankruptcy Message" stating as follows: "Our records indicate that either you are a debtor in bankruptcy or you discharged personal liability for your mortgage loan in bankruptcy. We are sending this statement to you for information and compliances purposes only. It is not an attempt to collect a debt against you. If you want to stop receiving statements, write to us at the General Correspondence address listed on page 2 of this statement."

On or about September 15, 2021, Lender sent the Debtors separate, but identical documents by certified mail. See Debtor Ex. 3. Both are entitled "Non-Monetary Notice of Default." Both notices ("Non-Monetary Notice of Default") recite the events of default stated in the Secured Note, and then specify:

> **Due to your Bankruptcy filing, you are now in default**. [Lender] intends to move forward with replevin/foreclosure action to repossess the collateral.

Immediately thereafter, the Non-Monetary Notice of Default states:

> **Methods to Cure Default:** (1) Send in the full payoff; (2) Voluntarily Vacate; (3) Re-open Bankruptcy & file a Reaffirmation Agreement. (Emphasis added.)

Like its Mortgage Statement, the Lender's Non-Monetary Notice of Default also includes bankruptcy language as follows: "Please be advised further that this letter constitutes neither a demand for payment of the captioned debt nor a notice of personal liability to any recipient

hereof who might have received a discharge of such debt in accordance with applicable bankruptcy… This letter is being sent to any such parties merely to comply with applicable state law governing foreclosure of liens pursuant to contractual powers of sale..”[5]

On or about October 11, 2021, Lender sent Rolando another “Mortgage Statement” setting a payment due date of 11/1/2021, in the payment amount of $653.25. See Debtor Ex. 5. The Mortgage Statement acknowledged that the Lender had received a customer payment in the same amount on 10/4/2021. Unlike the prior Mortgage Statement, this one indicated that on 9/14/2021, a payment of $653.25 was reversed, that on 9/17/2021, a late fee of $26.53 was charged, and that on 10/4/2021, another payment of $653.25 was received. The Mortgage Statement also includes an information box entitled “Bankruptcy Message” identical to the prior statement.

On or about October 26, 2021, Lender sent Rolando a letter. See Debtor Ex. 6. The letter states as follows:

> This letter is to inform you that 21st Mortgage Corporation received a payment in the amount of $653.25, on 10/04/2021. **Your account is currently in default due to your Bankruptcy filing;** therefore, 21st Mortgage Corporation is unable to accept payments, and, as such, these funds will be returned to you. You received a Non-Monetary Notice of Default on or about 9/21/2021. Per the Notice of Default, you have three (3) options: (1) Voluntarily Vacate; (2) Send in the full payoff [payoff quote]; or (3) Reopen the Bankruptcy & file a Reaffirmation Agreement. This Notice of Default expired 10/16/2021.

Accompanying the letter is another page stating in bold type **“**PLEASE TAKE NOTICE**.”** It then goes on to state, *inter alia*, as follows:

> This is an attempt to collect a debt and any information obtained will be used for that purpose.
>
> Please be advised further that this letter constitutes neither demand for payment of the captioned debt nor a notice of personal liability to any recipient hereof who might have received a discharge of such debt in accordance with applicable bankruptcy laws…

[5] Lender issued a check payable to Rolando dated 9/10/21 in the amount of $653.25, apparently to return the payment Lender received on 9/08/21. See Debtor Ex. 4.

Apparently, included with the October 26, 2021 letter was a check from the Lender dated 10/22/2021, in the amount of $653.25, payable to Rolando.

On or about October 27, 2021, Rolando sent a letter to the Lender. See Debtor Ex. 7. Among other things, Debtors informed the Lender that they did not wish to lose their Residence, that they had not cashed Lender's two checks for the prior loan payments, and that they had consulted a lawyer regarding the situation.[6]

On or around November 4, 2021, Debtors were sent a common letter by certified mail from a law firm representing the Lender. See Debtor Ex.8. The letters sent from the law firm stated, among other things, that the Lender intended to foreclose it's lien against the Residence or repossess the Residence. It directs the Debtors to contact the Lender within 30 days to avoid such actions. Page 2 to the letter states in bold type "**IMPORTANT INFORMATION BELOW**." The information below states as follows:

> **ATTENTION TO ANY DEBTOR IN BANKRUPTCY OR ANY DEBTOR WHO HAS RECEIVED A DISCHARGE IN BANKRUPTCY OR WHO MAY HAVE PAID OR SETTLED, OR OTHERWISE IS NOT OBLIGATED UNDER, THE LOAN.** Please be advised that this letter constitutes neither a demand for payment of the Loan nor a notice of personal liability to nor action against any recipient hereof who might have received a discharge of the Loan in accordance with applicable bankruptcy laws or who might be subject to the automatic stay of Section 362 of the United States Bankruptcy Code, or who has paid or settled or is otherwise not obligated by law for the Loan.

On or about November 10, 2021, Lender sent Rolando another "Mortgage Statement" setting a payment due date of 12/1/2021, in the payment amount of $2,012.61. See Debtor Ex. 9.

---

[6] The October 27, 2021, letter from the Debtors to the Lender explained their situation, in pertinent part, as follows: "We filed for bankruptcy due to the unforeseen circumstances with our financials because Cherry is diagnosed with End Stage Renal Disease, currently on dialysis 3 x week and waiting for kidney transplant. I, Rolando resigned on my job because I don't want to risk my wife's health due to this pandemic. We cannot afford to loose our home since at this time Cherry is currently needing wheelchair for her mobility and we have built a ramp for her easy access. This is exactly the size of the house that Cherry can mobilize without any difficulty. We prioritized our remaining funds to make sure we pay our loan on time. We never cash out nor intended to cash out the 2 returned checks from 21st Mortgage Corporation (#05239032 and #05250150). When we received your letter I (Rolando) observed Cherry to be very stressed out. With this pandemic situation an additional stress for us is too much to deal with."

The Mortgage Statement acknowledged that the Lender has received a customer payment in the same amount on 10/25/2021. Like the prior Mortgage Statement, this one indicated that on 10/25/2021, a payment of $653.25 was reversed, that on 10/26/2021, a late fee of $26.53 was charged, and that on 11/4/2021, another payment of $653.25 was received. The Mortgage Statement also includes an information box entitled "Bankruptcy Message" that is identical to the prior statements.

On or about November 16, 2021, Lender sent Rolando a letter. See Debtor Ex. 10. The letter states as follows:

> This letter is to inform you that 21st Mortgage Corporation received a payment in the amount of $653.25, on 11/04/2021. **Your account is currently in default due to your Bankruptcy filing;** therefore, 21st Mortgage Corporation is unable to accept payments, and, as such, these funds will be returned to you. You received a Non-Monetary Notice of Default on or about 9/21/2021. Per the Notice of Default, you have three (3) options: (1) Voluntarily Vacate; (2) Send in the full payoff [payoff quote]; or (3) Reopen the Bankruptcy & file a Reaffirmation Agreement. This Notice of Default expired 10/16/2021. (Emphasis added.)

Accompanying the letter is another page containing language in bold type **"**PLEASE TAKE NOTICE**."** The language that follows is the same that was included with the prior letter of October 26, 2021. Additionally, the letter was accompanied by a check from the Lender payable to Rolando, dated 11/11/21, in the amount of $653.25.[7]

On December 3, 2021, Debtors filed an ex parte motion to reopen their Chapter 7 case for the purposes of pursuing a motion for contempt against the Lender for violating the discharge injunction under Section 524(a)(2). (ECF No. 26). On this same day, an order was entered granting Debtors' request to reopen their Chapter 7 case. (ECF No. 27).

On or about December 10, 2021, Lender sent Rolando another "Mortgage Statement" setting a payment due date of 1/1/2022, in the payment amount of $2,692.59. See Debtor Ex. 12. The Mortgage Statement acknowledged that the Lender has received a customer payment in the

[7] Debtors allege that it is the Lender's common practice to declare a default for purchasers of manufactured homes based on a bankruptcy filing. See Contempt Motion at 11:2-3. Debtors submitted as Debtor Ex. 11, a letter from the same Lender transmitting a proposed reaffirmation agreement in a different bankruptcy case.

same amount on 11/12/2021. The Mortgage Statement indicated that on 11/12/2021, a payment of $653.25 was reversed, that on 11/17/2021, a late fee of $26.53 was charged, and that on 12/3/2021, another payment of $653.25 was received. The Mortgage Statement also includes an information box entitled "Bankruptcy Message" identical to the prior statement.

On December 10, 2021, Debtors filed the instant Contempt Motion to which 11 exhibits are attached. (ECF No. 29) Debtor Ex. 1 is a declaration of Rolando Ramil Jallores Go dated December 9, 2021. The other ten documents are marked as Debtor Ex. 2 through Debtor Ex. 11.

On January 4, 2022, Lender filed its amended Opposition to the Contempt Motion. Attached to the Opposition is a declaration of Josh Williamson. (ECF No. 37). Lender Ex. A and Ex. B consist of copies of the Secured Note and the Title Information.

On January 5, 2022, Debtors filed their Reply to the amended Opposition. (ECF No. 38). Debtor Ex. 12 is attached to the Reply.

APPLICABLE LEGAL STANDARDS

A discharge entered in any bankruptcy case "operates as an injunction against the commencement or continuation of…an act, to collect, recover or offset any such debt as a personal liability of the debtor…" 11 U.S.C. § 524(a)(2). Parties who violate the statutory injunction imposed by Section 524(a)(2) may be held in contempt under Section 105(a). See Taggart v. Lorenzen, 139 S.Ct. 1795, 1801 (2019) ("In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.") (emphasis added). "To find a party in civil contempt, the movant must prove by clear and convincing evidence that the alleged contemnor violated a specific and definite order of the court." Bateman v. GemCap Lending I, LLC (In re Bateman), 2019 WL 3731532, at *6 (B.A.P. 9th Cir. Aug. 7, 2019) (emphasis added), citing Knupfer v. Lindblace (In re Dyer), 322 F.3d 1178, 1190-91 (9th Cir. 2003).

"The standard for evaluating civil contempt, thus, is an objective one." Bateman, 2019 WL 3731532, at *6, citing Taggart, 139 S.Ct. at 1804. The Supreme Court has explained "'that a party's subjective belief that she was complying with an order ordinarily will not insulate her

from civil contempt if that belief was objectively unreasonable.'" Freeman v. Nationstar Mortg. LLC (In re Freeman), 608 B.R. 228, 234 (B.A.P. 9th Cir. 2019), quoting Taggart, 139 S.Ct. at 1802. "That said, subjective intent is not always irrelevant: 'Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith.'…On the other hand, a party's good faith, even if it does not prevent a finding of civil contempt, might help determine the appropriate sanction." Freeman, 608 B.R. at 234, quoting Taggart, 139 S.Ct. at 1802.

DISCUSSION

As previously recited, the Secured Note specifies five events of default: (1) failure to make timely payments, (2) failure to perform any other obligations under the Secured Note, (3) death or legal incompetency to manage financial affairs, (4) statements of false, misleading, inaccurate, or incomplete facts in the Debtors' credit application or any other document submitted to the Lender, or (5) the filing of a bankruptcy petition. To proceed based on any of these grounds, the Secured Note obligates the Lender to "give Borrower notice of the default and right to cure the default." Debtors' sole default under the Secured Note is expressly declared by the Lender in its Non-Monetary Notice of Default: "your filing for Bankruptcy."

There is no question that the Lender sent the Debtors the Non-Monetary Notice of Default.[8] That notice, however, does not provide the Debtors a right to cure the only default specified inasmuch as the act of filing for bankruptcy relief cannot be undone. Instead, the Non-Monetary Notice of Default states that the Debtors can (1) send the full balance of the Secured Note, (2) voluntarily vacate the Residence, or (3) re-open the Chapter 7 case and file a reaffirmation agreement.

Debtors' filing for bankruptcy relief occurred on May 24, 2021, and the Lender has identified no method for that act to be cured because it is impossible to do so. Moreover, reopening of the Chapter 7 proceeding and reaffirming the debt arising from the Secured Note is

[8] Both the October 26, 2021, and November 16, 2021, letters from the Lender to Rolando refer to the same Non-Monetary Notice of Default. Both letters state that the Non-Monetary Notice of Default expired on 11/16/2021. No other Non-Monetary Notice of Default appears in the record.

legally impossible. Section 524(c) permits the court to approve a reaffirmation agreement, but "only if – (1) such agreement was made before the granting of the discharge under section 727… of this title." 11 U.S.C. §524(c)(1) (emphasis added). Because a reaffirmation agreement eliminates the benefit of a bankruptcy discharge by continuing a debtor's personal liability for a prebankruptcy debt, any proposed reaffirmation agreement must include a variety of express disclosures to the debtor, including the effect of a reaffirmation agreement on the debtor's personal liability and the enforceability of any liens. See 11 U.S.C. § 324(k)(3)(J)(i). A lender who obtains a reaffirmation agreement preserves its ability to pursue the full amount of the debt as a personal liability of the debtor. So while the Lender in the instant case apparently assumes that a reaffirmation would cure the legal consequence of the Debtors' bankruptcy discharge, rather than the actual event of default on which it relies, that purported method of cure is not even available.[9] Lender's provision of the Non-Monetary Notice of Default to its borrower simply did not give the Debtors a right to cure at all. Because the Lender has not provided a Notice of Default that is required by the plain language of the Secured Note, the Lender also does not have the ability to accelerate the maturity date of the obligation or to repossess the Residence.

In response to the Contempt Motion, Lender maintains that the Debtors failed to file a valid Statement of Intention in compliance with Section 521(a)(2)(A). See Opposition at 3:21 to 4:16.[10] Instead of checking one of the boxes for surrender of the Residence, reaffirmation of the Secured Note under Section 524(c), or redemption of the Residence from the Lender's secured claim under Section 722, Debtors checked the box specifying "other" and inserted the "retain

---

[9] It is not entirely clear why the Lender, who had notice of the Debtors bankruptcy proceeding, did not offer a reaffirmation agreement before the Debtors received their discharge on August 24, 2021.

[10] Debtors argue that the Lender's response to the Contempt Motion was filed late under the court's local rules and should be stricken or go unheard. See Reply at 2:2-3. While the Opposition was filed untimely under LR 9014(d)(1), the court has discretion to allow a late filing. See LR 1001(d). No prejudice to the Debtors exists in considering the Lender's arguments in addition to the copy of the Secured Note and Title Information necessary to the resolution of this matter. Debtors' request to strike the Opposition is denied.

and pay current" language. Lender is correct that a "retain and pay" or "ride through" alternative to surrender, reaffirmation, or redemption of the relevant property generally did not survive the bankruptcy law amendments enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). See Dumont v. Ford Motor Credit (In re Dumont), 581 F.3d 1104, 1118 (9th Cir. 2009).[11] In Nevada, the so-called "ride through" option effectively was supplanted by the Nevada legislature through enactment of NRS 97.299, et seq. See In re Henderson, 492 B.R. 537 (Bankr. D. Nev. 2013).[12]

Debtors' failure to select a permissible option on the Statement of Intention arguably triggered Section 362(h). That provision specifies the consequence when an individual Chapter 7 debtor fails to timely file or perform a statement of intention required by Section 521(a)(2): all of the personal property that is subject to the secured creditor's lien is no longer property of the Chapter 7 estate and the automatic stay protecting the property terminates. See Samson v. Western Capital Partners (In re Blixseth), 684 F.3d 865, 870-71 (9th Cir. 2012). Although these failures may have serious consequences to the bankruptcy estate and the debtor, the failures do not prevent the debtor's personal liability from being discharged, nor does it relieve creditors from complying with a Chapter 7 discharge. More important, the Debtors' failure in this case to

[11] The "ride through" alternative to the authorized treatments of secured consumer debt should not be confused with the "pass through" treatment of liens generally in bankruptcy. See The Bank of New York Mellon v. Lane (In re Lane), 589 B.R. 399, 409-410 & n. 6 (B.A.P. 9th Cir. 2018, citing Dewsnup v. Timm, 502 U.S. 410, 417 (1992). No steps were taken during the Chapter 7 to avoid the Lender's lien against the Residence, and the Lender took no steps to prevent the Debtors' discharge of their personal liability under the Secured Note. As a result, Lender can enforce its lien rights against the Residence if it complies with the terms of the Secured Note, but it cannot enforce its rights to collect the balance of the Secured Note as a personal liability of the Debtors.

[12] In this instance, the Residence is a manufactured home and not a vehicle that would be protected by NRS 97.299. That provision governs motor vehicle sales contracts in Nevada entered after October 1, 2011. The Nevada statute effectively eliminated bankruptcy ipso facto clauses by allowing a lender to repossess a motor vehicle only upon a payment default, or if the lender establishes a significant impairment of its prospect for repayment or realization of its collateral. In view of these protections afforded under applicable non-bankruptcy law, entry into a reaffirmation agreement for a Nevada motor vehicle purchase is almost never in the best interests of individual debtors who are current on their payments.

identify an available option in their Statement of Intention also did not excuse the Lender from complying with the requirements of the Secured Note to pursue its remedies against the Residence.

Lender's ipso facto clause is based on a borrower's filing of a bankruptcy case rather than a borrower's receipt of a bankruptcy discharge. This is significant because many bankruptcy cases are filed but may be dismissed or otherwise concluded without a discharge being entered. After a discharge is granted, a debtor and a creditor can avoid the effect of the discharge through voluntary repayment of the debt. See 11 U.S.C. §524(f). Before a discharge is granted, a debtor and a creditor can negotiate a reaffirmation of the debt to prevent the debt from being discharged. See 11 U.S.C. §524(c)(1).[13] Under no circumstances can the debtor and creditor cure the fact of a bankruptcy filing.[14] Once filed, a bankruptcy petition cannot be unfiled.

---

[13] If the Debtors had reaffirmed the Secured Note, the Debtors would have remained personally liable for the unpaid balance and the Lender would still have its lien against the Residence. Thereafter, upon a payment default, a Notice of Default providing the possibility of an actual cure could have been provided. After providing the Notice of Default and an actual right to cure, Lender could have accelerated the Secured Note and pursued foreclosure. Resort to the ill-conceived bankruptcy ipso facto event of default would have been unnecessary. It is still unclear why the Lender did not pursue a reaffirmation agreement before the discharge was entered when it had been provided notice of the Debtors' bankruptcy proceeding. In other words, the instant dispute apparently could have been prevented if the Lender had acted timely upon receiving notice of the bankruptcy rather than trying to recover after the discharge was entered.

[14] When a debtor or trustee seeks to assume an executory contract or unexpired lease, Section 365 permits the contract or lease to be assumed despite the presence of an ipso facto clause, unless the contract is for a loan or other debt financing. See 11 U.S.C. §365(e)(2)(B). Thus, even if the Secured Note was encompassed by Section 365, it still could not be assumed because it is a contract for a loan. Compare 11 U.S.C. § 521(d) (ipso facto clause not prevented or limited where individual debtor fails to timely reaffirm or redeem, or fails to timely file or perform a statement of intention). More important, Section 365 conditions the assumption of contracts on a cure of defaults other than defaults that are "impossible for the trustee to cure." 11 U.S.C. § 365(b)(1)(A). See 3 COLLIER ON BANKRUPTCY ¶ 365.06[4] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2021) ("The [cure] requirements of section 365(b)(1) do not apply to defaults that relate to…the commencement of the case…In the context of the cure requirement, the exception is particularly important because the trustee cannot possibly cure a default flowing, for example, from the debtor's commencement of a case…If a provision stating that the contract was in default upon the filing of a bankruptcy petition could be enforced, parties could write contracts that could never be assumed by a trustee or debtor in possession..") (emphasis added).

In this case, the express terms of the Secured Note required the Lender to give the Debtors a right to cure the default by providing a Notice of Default. In this case, only after providing a Notice of Default can the Lender accelerate the obligation under the Secured Note and take steps to repossess the Residence. In this case, the Debtors have not volunteered to repay a discharged debt as permitted by Section 524(f), the parties cannot enter into a reaffirmation agreement under Section 524(c), and the Lender has not offered a cure for the only default asserted under the Secured Note. The Lender does not even suggest that any other specified event of default applied when it sent the Non-Monetary Notice of Default: Debtors had not missed a payment; Debtors had not failed to perform any other obligations; Debtors were not dead or incompetent; and Debtors had not made any false, misleading, inaccurate or incomplete statements, representations or warranties. The uncontradicted record demonstrates that the Debtors have attempted to make the monthly payments required by the Secured Note while the Lender has relied on a provision of its own contract creating an event of default that is impossible to cure while also requiring the Lender to provide a right to cure. In essence, the record establishes a purely self-inflicted wound.

Under these circumstances, it appears that the Lender is attempting to collect the balance outstanding under the Secured Note by asserting a right to accelerate and repossess that the Lender does not have under the language of the same Secured Note. Because it cannot enforce its lien under the Secured Note, the court concludes that its demands for payment seek to collect the balance of the outstanding amount as a personal liability of the Debtors. The offer of a legally impermissible reaffirmation agreement to the Debtors appears to confirm that the Lender's conduct is designed to pursue the balance as a personal liability. Such demands violate the discharge injunction protecting the Debtors under Section 524(a)(2).

To impose civil contempt sanctions under Section 105(a), the court must determine whether the Lender had an objectively reasonable basis for concluding that its conduct might be

---

In this instance, the Lender's own contract included an event of default that is impossible to cure and the same contract also obligated the Lender to provide a right to a cure before the Lender could accelerate and repossess the Residence. In other words, the Lender's action against the Debtors in this case appears to violate the terms of its own agreement.

lawful. Civil contempt sanctions may not be appropriate where there is a "fair ground of doubt as to the wrongfulness" of a creditor's conduct. See Taggart, 139 S.Ct. at 1801-02, citing California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885). "Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates the discharge order based on an objectively unreasonable understanding of the discharge order or the statutes governing its scope." Id.

In this instance, there is no dispute that the Lender had knowledge of the Debtors' discharge: the Mortgage Statement sent on or about September 10, 2021, acknowledged the Debtors' bankruptcy filing, and the Order of Discharge was sent to the Lender on or about August 24, 2021. There also is no dispute that the Lender knew it could not attempt to collect a discharged debt as a personal liability; the Bankruptcy Message included in the Mortgage Statements for September, October, November, and December, 2021, confirms that understanding. Despite such knowledge, however, Lender attempted to collect the balance of the Secured Note from the Debtors through lien enforcement methods that are unavailable under a plain reading of the same Secured Note.[15] Under these circumstances, the court concludes that there was no objectively reasonable basis for the Lender to conclude that its attempts to accelerate the Secured Note and to seek possession of the Residence were lawful. Accordingly, imposition of civil contempt sanctions are appropriate.

An evidentiary hearing will be required to determine the actual damages, if any, that are appropriate in this matter. An award of reasonable attorney's fees also will be considered. A status conference to schedule the evidentiary hearing, as well as to set any discovery or briefing deadlines, will be scheduled. The parties are, of course, encouraged to discuss a settlement of this matter.

[15] The court expresses no view on whether, outside the bankruptcy context, the Debtors would have other remedies against the Lender under the terms of the Secured Note, including legal remedies based on breach of contract or equitable remedies for declaratory and injunctive relief.

IT IS THEREFORE ORDERED that the Motion for Contempt for Violation of the Discharge Injunction 11 U.S.C. §524(a)(2), Docket No. 29, be, and the same hereby is, **GRANTED** subject to a further hearing to address any appropriate damages and attorney's fees.

IT IS FURTHER ORDERED that a status conference will be conducted on July 20, 2022, at 2:30 p.m., to discuss further proceedings.

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
ROLANDO RAMIL JALLORES GO
6223 E. SAHARA AVENUE, SPACE 122
LAS VEGAS, NV 89142

# # #