Are Condominium Assessments Dischargeable in Chapter 13 Proceedings?

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Under certain circumstances, the answer is "yes" according to a recent case from the Ninth Circuit Court of Appeals. *Goudelock v. Sixty-01 Ass'n of Apartment Owners*, No. 16-35385 (9th Cir. July 10, 2018). Specifically, the Ninth Circuit held that a pre-petition *in personam* debt (or "claim" in precise bankruptcy terminology) for assessments that is created when a property owner takes title to property and contractually obligates herself to pay assessments is dischargeable when the debtor successfully completes a confirmed Chapter 13 plan. While the statement itself appears complicated, analysis of the facts of *Goudelock* help put the opinion in perspective.

I. Facts

Penny Goudelock purchased a condominium unit in Redmond, Washington in 2001, and as expected, the deed to her unit was given subject to a previously recorded declaration of covenants and restrictions. And again as expected, the declaration provided that the condominium association could charge unit owners with assessments for the costs of running the association and the condominium and do so in two ways: having unpaid assessments become an enforceable lien against the owner's unit and also creating a personal obligation against the owners to pay the assessments. *Goudelock* at 3 – 4. It is the second right of the association, i.e., to charge the unit owner personally for unpaid assessments, that was in dispute in this case.

Goudelock stopped paying assessments in 2009 and the association began state court foreclosure proceedings. Goudelock responded by moving out of her unit and filing for Chapter 13 bankruptcy protection in March of 2011. Her confirmed Chapter 13 plan included a provision surrendering the unit, and the state court foreclosure sale was cancelled upon the mortgage lender paying the outstanding lien. The lender completed the state court foreclosure in February 2015 and Goudelock completed her plan obligations in July 2015 and received a discharge under 11 U.S.C. § 1328(a). However, Goudelock was not yet out of the woods as the association had brought suit in April 2015 to determine the dischargeability of Goudelock's personal obligation to pay the post-petition assessments accrued between the date when Goudelock filed her Chapter 13 petition (March 2011) and the date when the lender foreclosed on the unit in state court (February 2015). The dischargeability of this particular debt is the narrow issue the Ninth Circuit ruled upon.

II. Analysis

The Ninth Circuit began its analysis by first recognizing the issue of dischargeability of post-petition condominium assessments in Chapter 13 proceedings had never been addressed by a circuit court of appeal. Accordingly, it started by analyzing two circuit courts of appeal

decisions that discussed whether post-petition assessments were dischargeable in Chapter 7 proceedings: *Matter of Rosteck*, 899 F.2d 694 (7th Cir. 1990) (obligation to pay condominium assessments is an unmatured contingent debt that arose prepetition and is dischargeable), and *In re Rosenfeld*, 23 F.3d 833 (4th Cir. 1994) (obligation to pay cooperative association assessments run with the land and arise each month debtor is in possession of unit). Applying a plain reading of Bankruptcy Code, the Ninth Circuit adopted the *Rosteck* approach and held that while the association's *in rem* lien against the unit was not dischargeable in Chapter 13, the pre-petition *in personam* obligation was.

The Ninth Circuit's analysis was an exercise in straightforward statutory analysis. First, the court reviewed Chapter 13 and recognized that a Chapter 13 discharge is a discharge of all "debts" with few exceptions. 11 U.S.C. § 1328(a). This is a discharge that is broader than in all other sections of the Bankruptcy Code. *Goudelock* at 8. Moreover, the definition of "claim" is also very broad and encompasses all of a debtor's obligations "*no matter how remote or contingent*." *Goudelock* at 9, citing *In re SNTL Corp*., 571 F.3d 826, 838 (9th Cir. 2009) (quoting *In re Jensen*, 995 F.2d 925, 929 (9th Cir. 1993)) (emphasis in original). And in the view of the Ninth Circuit, the broadness of the Bankruptcy Code language indicated that the obligation to pay association assessments was a "debt" subject to the super-discharge powers of Chapter 13 notwithstanding the debt was contingent or unmatured.

The court next examined the timing of the obligation, and concluded that Goudelock's obligation to pay assessments was a "debt" created when she became the owner of the unit and not the result of a separate post-petition obligation - post-petition obligations being non-dischargeable. Thus, the debt arose pre-petition and was dischargeable unless a separate section of the Code provided the debt could not be discharged. Looking at Bankruptcy Code subsections 1328(a)(1) – (4) and noting that they enumerate the only exceptions to the broad discharge of debts under Section 1328(a), the Ninth Circuit held the debt was dischargeable because Congress did not specifically list condominium assessments as a non-dischargeable debt in Chapter 13 cases like it did for Chapter 7 cases in Bankruptcy Code 523(a)(16). *Goudeck* at 11. The Ninth Circuit found the exclusion to be purposeful and brushed aside arguments the exclusion was an oversight.

Likewise, the Ninth Circuit found the Takings Clause of the Constitution was not implicated because the association retained its *in rem* right to foreclose its lien, and that there were no "equitable" concerns (i.e., possible "free rent" by continuing to live in a unit post-petition without paying assessments) to its decision because any such equitable concerns could not override the express statutory language chosen by Congress.

III. Take-Aways

There are several items practitioners should focus on when confronted with a situation similar to *Goudelock.* First, practitioners should examine which Chapter of the Bankruptcy Code the debtor filed under, and if under Chapter 13, keep in mind that it is difficult to confirm a plan

under Chapter 13 and that conversion to Chapter 7 is often the end result of a Chapter 13 petition filing.

Second and despite the Ninth Circuit's dismissal of equitable concerns, one has to wonder whether a trial court bankruptcy would be more amenable to some form of adequate protection or required payment for residing in the unit during the pendency of a bankruptcy case. Also keep in mind that Ms. Goudelock moved out of her unit approximately at the same time that she filed her Chapter 13 proceedings, meaning she was not living "rent free" for a period of time. We cannot speculate what the Ninth Circuit may have done had Goudelock attempted to discharge pre-petition obligations while living in the unit for several years, but litigants on the other side of that equation can argue that any such reading of the *Goudelock* opinion is dicta and cannot be relied upon.

Finally, practitioners may want to focus on the *in rem* remedies an association may have and concentrate their efforts in that arena. There remain a good deal of questions surrounding different factual scenarios arising out of the facts of *Goudelock,* but the *in rem* remedy continues to be a powerful and forceful way for associations to recover assessments.

IV. Conclusion

Goudelock provides an answer we have not had before that pre-petition condominium assessments are dischargeable in Chapter 13 proceedings, but leaves some crucial questions unanswered. This being the first circuit court case on the issue, chances are the other circuits may weigh in on the issue. Practitioners should be aware of *Goudelock* and its possible application to every Chapter 13 case where the debtor owns a condominium unit.