UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Jeffrey Mark Freeman, Debtor(s)	Case No.: 2:11-bk-34162-NB Chapter: 13 **MEMORANDUM DECISION UPON REMAND** Hearing Dates: Date: July 28, 2020, August 18, 2020 Time: 2:00 p.m. Place: Courtroom 1545 255 E. Temple Street Los Angeles, CA 90012

Under the law of this case, the lien of creditor Nationstar Mortgage LLC ("Nationstar") was rendered void, and should have been reconveyed, as soon as debtor Jeffrey Mark Freeman ("Debtor") paid off his chapter 13 plan and received his discharge. Nationstar's initial attempts to enforce that lien, and its subsequent refusal for several months to record a reconveyance, amounted to an attempt to collect a discharged debt from Debtor personally, and therefore violated the discharge injunction of § 524.[1] *In re Freeman,* 608 B.R. 228 (9th Cir. BAP 2019).

[1] Unless the context suggests otherwise, a "chapter" or "section" ("§") refers to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code"), a "Rule" means the Federal Rules of Bankruptcy Procedure or other federal or local rule, and other terms have the meanings provided in the Code, Rules, the parties' filed papers, this Bankruptcy Court's prior decision (dkt. 267) and the BAP's *Freeman* decision. In the following discussion, any findings of fact

The question is whether that violation amounts to civil contempt. On the record presented, it does not.

1. INTRODUCTION

Nationstar's subjective belief about whether it violated the discharge injunction is not a defense to contempt. *Taggart v. Lorenzen,* 139 S.Ct. 1795, 1801 (2019). But Nationstar's understanding of the scope of the discharge injunction is relevant in at least two ways.

First, if Nationstar understood that it was violating the discharge injunction then it was intentionally violating this Bankruptcy Court's discharge order. Such intent, or other bad faith acts, would expose it to contempt sanctions. *See Freeman,* 608 B.R. 228, 234.

Second, Nationstar has argued that its interpretation of the scope of the discharge injunction establishes, on an objective basis, a "fair ground of doubt" about whether its conduct was unlawful under the discharge order. *Taggart,* 139 S.Ct. 1795, 1804 (citation and internal quotation marks omitted). "Under the fair ground of doubt standard," civil contempt "may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope." *Id.* at 1802 (emphasis added). *See also id.* ("a party's subjective belief that she was complying with an order will not insulate her from civil contempt if that belief was objectively unreasonable").

2. PROCEDURAL BACKGROUND

Upon remand this Bankruptcy Court issued an order setting a status conference (dkt. 297) and, after that conference, a scheduling order (dkt. 302). After several agreed continuances the parties filed their briefs and this matter came on for hearing at the above-captioned time.

The tentative rulings posted prior to the hearings stated in relevant part:

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that include conclusions of law shall be deemed conclusions or law to that extent, and any conclusions of law that include findings of fact shall be deemed findings of fact to that extent.

> (a) Debtor's brief re liability of Nationstar Mortgage, LLC for damages for contempt (violation of discharge injunction) (dkt. 320), Nationstar's opposition (dkt. 321), Debtor's reply (dkt. 322)
>
> (i) Scope of remand
>
> The tentative ruling is that the parties should be prepared to address whether (i) there is any dispute that the Bankruptcy Appellate Panel ("BAP") determined that the actual meaning of the confirmed chapter 13 plan and the confirmation order was to reduce the amount of the debt secured by Nationstar's lien, such that when that debt was paid the lien automatically became void, and (ii) the BAP remanded the matter to this Court to address whether Nationstar's understanding of whether the discharge injunction applied was or was not objectively reasonable, and thus whether Nationstar is subject to contempt sanctions.
>
> (ii) No further evidence regarding whether Nationstar is subject to contempt sanctions; but further evidence might be appropriate on other issues
>
> The tentative ruling is also that, because the record for this matter was closed when this Court took the matter under submission, prior to the appeal to the BAP, therefore no further evidence is appropriate regarding whether Nationstar is subject to contempt sanctions. But, if it is subject to sanctions, then the tentative ruling is that further evidence and an evidentiary hearing may be appropriate regarding the dollar amount of any compensatory damages and any other damages or sanctions. Those issues can be addressed at a future hearing, if appropriate, and meanwhile the tentative ruling is that the scope of this hearing is limited to whether Nationstar is subject to contempt sanctions.
>
> (iii) Merits
>
> There is no tentative ruling on the merits of that question. This Court has reviewed the parties' briefs, and the parties are invited to make brief oral arguments, following which this Court anticipates taking the matter under submission …. [Tentative ruling for July 28, 2020, 2:00 p.m., calendar nos. 6 & 7.]

After oral argument this Bankruptcy Court adopted the tentative rulings and took the matter under submission. *See generally Wilkins v. United States,* 279 F.3d 782, 790 (9th Cir. 2002) (on remand, trial court had discretion to determine how to proceed); *In re Washington Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1302 (9th Cir. 1994) (on remand, trial court could rule on record developed earlier, or could take additional evidence). *See also Hall v. City of L.A.*, 697 F.3d 1059, 1067 (9th Cir. 2012) (trial court's discretion on remand, within limits of appellate court's mandate); *and see* Rules 9014 *and* 9020 (Fed. R. Bankr. P.) (procedures on contempt proceedings).

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3. FINDINGS OF FACT

The parties' disagreement arises from a last-minute agreed interlineation to the confirmation order. The key language provides:

> For purpose of plan confirmation, the value of the [Property] is determined to be $194,000. The amount of the secured claim which shall be paid, in full, during the life of the chapter 13 plan is $169,340, with interest at the rate of 6.75% for the remaining 48 months of the Chapter 13 Plan. [Dkt. 73, p. 3, ¶ 1.b (quoted in *Freeman,* 608 B.R. 228, 231).]

Based on an extensive review of the filed documents and records in this case including many oral arguments (*see* dkt. 267, p. 17 at n.10 & accompanying text), this Bankruptcy Court finds that Nationstar's understanding of this language is best reflected in its 2014 objection to Debtor's motion to refinance the subject property:

> First, Debtor proposes to borrow $130,000.00 from a private lender yet to be determined, and apply the proceeds from the refinance to <u>allegedly</u> satisfy Creditor's secured claim in full. The Debtor <u>alleges</u> that the balance owed to Creditor is approximately <u>$117,876.00</u>, pursuant to an <u>alleged</u> modification of Creditor's lien via the Debtor's Chapter 13 Plan. However, pursuant to Creditor's proof of claim filed in the Debtor's bankruptcy case, Creditor's total claim as of the date of filing was approximately <u>$379,125.14</u>. Furthermore, <u>the Debtor fails to provide sufficient evidence that Creditor's lien was modified by the Chapter 13 Plan</u>. Pursuant to the Plan Order, which requires a motion or adversary proceeding to avoid a lien, and Local Bankruptcy Rule 4003- 2(b)(1), which states, "A separate notice and motion must be filed for each lien sought to be avoided," the <u>Debtor has failed to take the proper action necessary to modify Creditor's lien</u>. Indeed, Debtor's Motion to Avoid [a different, junior] Lien [dkt. 14] and the subsequent Order thereon [dkt. 32] does not specifically address the valuation or avoidance of any portion of Creditor's lien. Accordingly, the Debtor's confirmed Chapter 13 Plan is not sufficient to modify Creditor's claim. Furthermore, even assuming arguendo, that the Chapter 13 Plan is sufficient to modify Creditor's claim, the Debtor has failed to demonstrate [when] such modification and lien avoidance is effective …. Based on the foregoing, the Court should deny the Debtor's Motion to Refinance. [Dkt. 125, p. 4:2-18 (emphasis added).]

The above-quoted text appears to mean two things. First, Nationstar was distinguishing between (a) whatever remained to be <u>paid</u> under Debtor's Plan (the $169,340 as of confirmation, per the confirmation order, dkt. 73, p. 3, subsequently reduced to "approximately $117,876.00," dkt. 125, p. 4:5) and (b) the <u>total</u> dollar amount of its debt secured by its lien ("$379,125.14," *id.,* p. 4:8).

1 This Bankruptcy Court finds that this was in fact Nationstar's understanding. (To
2 be clear, the sole issue at this point is what Nationstar's actual understanding was, not
3 whether that understanding was objectively unreasonable, which is addressed below.)
4 Second, the above-quoted text also shows that Nationstar was expecting further
5 proceedings before either (a) any modification of the total dollar amount of its claim
6 secured by the lien or (b) any avoidance of its lien upon payment of anything less than
7 that total dollar amount. Specifically, this Bankruptcy Court finds that Nationstar was
8 expecting notice, "a motion or adversary proceeding to avoid a lien" (dkt. 125, p. 4:10),
9 and orders providing such relief, including provisions about precisely when "such
10 modification and lien avoidance is effective." Dkt. 125, p. 4:17.
11 This Bankruptcy Court also finds that the foregoing understandings continued
12 throughout all relevant times. First, Debtor has not pointed to anything in the record that
13 would have informed Nationstar at this time (in 2014) that its interpretation of its lien
14 rights was untenable. Debtor abandoned his attempt to refinance the lien, so this
15 Bankruptcy Court was never asked to rule on whether Debtor's or Nationstar's
16 interpretation was correct.
17 Second, as this Bankruptcy Court previously has found (dkt. 267, pp. 11:18-
18 14:21), Debtor's later communications with Nationstar were unclear. In other words,
19 nothing in the record shows any subsequent communications from Debtor that would
20 change Nationstar's understanding.
21 Third, Nationstar's subsequent arguments in court and in its filed papers show
22 that it continued to believe that its lien survived, and applied to the total debt, not just
23 the fraction that was being paid in the Plan. Although this Bankruptcy Court later
24 approved an early payoff of all amounts due under the Plan (dkt. 154 (copied at dkt.
25 207, Ex. A)), that is not inconsistent with Nationstar's understanding that the amount
26 due under the Plan (what the confirmation order refers to as its "secured claim") was
27 only a portion of the total debt that continued to be secured by its lien. *See, e.g.,* Opp.
28 To Sanctions Mot. (dkt. 256) p. 1:6-10 & n.1 *and id.* at pp. 3:16-4:4 & nn.2-3

1 (emphasizing difference, in provision added to the confirmation order, between "value"
2 of property and "secured claim" amount; noting that confirmation order "does not
3 address whether the in rem and personal obligations under the Loan would be
4 extinguished, and if so, when"; and pointing out that "[n]o noticed motion" or "adversary
5 proceeding" was "filed or served upon BAC or Nationstar to modify their claim, or
6 provide notice of the unusual and vague provisions contained in the Confirmation Order"
7 or "to void or remove Nationstar's lien").

8 Fourth, Nationstar's actions matched its words. The foreclosure notices sent by
9 Nationstar were careful to emphasize that Nationstar was acting solely against the
10 Property, not against Debtor individually. *See, e.g.,* dkt. 254, Ex. A, at PDF p. 11 ("any
11 action taken to enforce the debt will be taken against the property only").

12 Fifth, as soon as Debtor explained his lien avoidance theory, in a filed
13 declaration, Nationstar sent a reconveyance of its deed of trust for recording. *Id.,*
14 pp. 14:22-18:4; dkt. 208, p. 4:6-16. This suggests that Nationstar's understanding was
15 changed by that declaration, and not before.

16 Of course, this Bankruptcy Court recognizes that Nationstar's terminology is not
17 always consistent. But this Bankruptcy Court finds that the lack of consistency is only
18 further evidence of Nationstar's confusion, and its understandings that there would be
19 further notice, proceedings, and order(s) before its *in rem* rights were affected, including
20 any reduction of its total debt secured by those *in rem* rights. Whether those
21 understandings were objectively unreasonable is a separate issue, addressed below.

22 Based on the foregoing, and the other filed documents and records in this case,
23 this Bankruptcy Court finds that at all relevant times – *i.e.,* at all times prior to when it
24 reconveyed the deed of trust – Nationstar's understanding remained unchanged. It
25 understood that the dollar amount to be paid under Debtor's Plan was different from the
26 total dollar amount of its debt secured by its lien. It also understood that further notice,
27 proceedings, and orders would be necessary before its total debt or lien rights would be
28 affected.

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4. LEGAL STANDARDS

The discharge injunction provides, in relevant part:

> (a) A discharge in a case under this title—
> * * *
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;
> * * * [§ 524 (emphasis added)]

A creditor who violates that discharge injunction is subject to being held in contempt under § 105, applying the same standards that have "long governed how courts enforce injunctions." *Taggart,* 139 S.Ct. 1795, at 1801; *In re Dyer,* 322 F.3d 1178, 1189-90 (9th Cir. 2003). It is long established that a finding of contempt requires the violation of a "specific and definite" order. *See, e.g., In re Marino*, 577 B.R. 772, 783 (9th Cir. BAP 2017).[2]

Normally, enforcement of a lien is not a violation of the discharge injunction because the discharge injunction by its terms only prohibits efforts to collect debts "as a personal liability of the debtor." § 524 (emphasis added). But, "[e]ven if a creditor threatens only to enforce its surviving lien, that threat will violate the discharge injunction if the evidence shows that the threat is really an effort to coerce payment of the underlying discharged debt." *See, e.g., Marino,* 577 B.R. 772, 784 (citation omitted, emphasis added).

Under *Taggart,* as noted above, a court "may hold a creditor in civil contempt for violating a discharge order where there is," on an "objective" basis, "not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order." *Taggart,* 139 S.Ct. 1795, 1804 (emphasis added; citation omitted). "Under the fair ground of doubt standard," civil contempt "may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope." *Id.* at 1802 (emphasis added).

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[2] This Bankruptcy Court recognizes that, on other issues, *Marino* followed precedent that has been overruled by *Taggart*. But on all the issues for which *Marino* is cited in this decision it remains good law.

The party seeking contempt sanctions has the burden of proof. That party must establish the relevant facts by "clear and convincing" evidence. *FTC v. Affordable Media, LLC,* 179 F.3d 1228, 1239 (9th Cir. 1999).

5. APPLICATION OF THE LAW TO THE FACTS

As the BAP has held, "satisfaction of the underlying debt satisfies the lien," and "once an obligation no longer exists to be secured by the lien, the lien is void" under California law. *Freeman,* 608 B.R. 228, 235 (citations omitted, emphasis added). Nationstar, however, understood there to be a difference between (a) the dollar amount to be paid under Debtor's Plan (described in the Plan as its "secured claim") and (b) the total dollar amount of its debt secured by its lien. In other words, Nationstar did not understand that its entire debt had been paid when Debtor had finished paying the dollar amount that was agreed to be paid as a secured claim under Debtor's Plan. Nationstar also expected further notice, proceedings, and orders before its total debt or its lien would be affected.

This Bankruptcy Court concludes that Debtor has not met his burden to show, by clear and convincing evidence on an "objective" basis, that there was no "fair ground of doubt" that the discharge injunction applied to bar Nationstar from enforcing what it thought were its surviving post-discharge lien rights. *Taggart,* 139 S.Ct. 1795, 1804 (emphasis added; citations omitted). In other words, Debtor has not established by clear and convincing evidence that Nationstar had an "objectively unreasonable" understanding that its *in rem* lien rights survived Debtor's personal discharge. *Id.* at 1802.

Several considerations support these conclusions of law.

(a) This Bankruptcy Court's own understanding

This Bankruptcy Court itself had the same understanding as Nationstar. *See* dkt. 267. If a Bankruptcy Judge can reach that understanding, after extensive analysis, it does not appear that such understanding is "objectively unreasonable." *Id.*

1 **(b) A "secured claim" is not necessarily equal to the full dollar amount**
2 **secured by a lien**

3 This Bankruptcy Court takes judicial notice that the term "secured claim" has
4 different meanings: it can refer to the arrears, or the bifurcated claim, or the full dollar
5 amount of a claim without bifurcation. These different meanings show that it was not
6 objectively unreasonable for Nationstar to have a similar understanding that the
7 confirmation order's reference to the "secured claim" meant only what was to be paid
8 under the Plan, not its total debt secured by its lien.

9 For example, this Bankruptcy Court takes judicial notice that it is common for
10 parties, trustees, and courts to refer to arrears as the "secured claim" that is paid "in the
11 plan" while the underlying total debt is paid "outside of the plan," with the lien passing
12 through bankruptcy unaffected. *See, e.g., In re Lopez,* 372 B.R. 40, at 42 n. 3, 48 & 51
13 (9th Cir. BAP 2007) (chapter 13 plans often treat "the arrearages as a distinct claim to
14 be paid off within the life of the plan" while regular monthly payments on the underlying
15 debt are separately paid directly to the creditor "outside of the plan") (quoting *Rake v.*
16 *Wade,* 508 U.S. 464, 473 (1993)). Of course, that is only an analogy – not what
17 happened in this case. The point is that it is common to distinguish between (i) the
18 "secured claim" paid in the plan and (ii) the total dollar amount secured by a lien, which
19 passes through bankruptcy.

20 Bifurcation is another example. Because claims are not always bifurcated, the
21 "secured claim" can be different from the value of the collateral. *Compare* § 506(a)(1)
22 *with* § 1111(b) (option in chapter 11 cases to elect no bifurcation); § 1322(b)(2) (no
23 modification of principal residence claims, regardless of valuation); § 1325(a) (hanging
24 paragraph) (no bifurcation of certain vehicle claims). Again, the point is not that there
25 was any explicit determination to apply or not to apply bifurcation in this case – in fact,
26 Nationstar has consistently objected that there was no express treatment one way or
27 the other: no notice, no proceedings, and no orders bifurcating its claim. Rather, the
28 point is that because the "secured claim" referred to in Debtor's Plan was not

1 necessarily the same thing as a bifurcated claim, it was not objectively unreasonable for
2 Nationstar to understand that when its "secured claim" was paid off that did not
3 necessarily pay off its entire claim.

4 **(c) Liens often "pass through" bankruptcy**

5 Liens not infrequently pass through chapter 7, chapter 13, and chapter 11 cases
6 either unaffected or in different dollar amounts than the alleged value of the collateral,
7 either by law or by agreement. *See generally, e.g., Nobleman v. Am. Sav. Bank,* 113
8 S.Ct. 2106 (1993); *Dewsnup v. Timm,* 112 S.Ct. 773 (1992); *Johnson v. Home State*
9 *Bank,* 501 U.S. 78, 83 (1991). In addition, as previously pointed out (dkt. 267), the
10 typical practice for any lien modification would involve further notice, proceedings, and
11 orders or agreement between the parties. In this context it was not objectively
12 unreasonable for Nationstar to interpret Debtor's Plan as reserving any lien avoidance
13 for future notice, proceedings, and orders or agreement.

14 **(d) The different dollar amounts used by the parties make any intent to**
15 **bifurcate Nationstar's claim more obscured**

16 This Bankruptcy Court takes judicial notice that the dollar amounts discussed by
17 the parties were all over the map, which makes it more difficult to discern what
18 interpretation of the confirmation order and discharge injunction was objectively
19 unreasonable. This lack of certainty is a far cry from the "clear and definite" directive
20 that must underly any finding of contempt. *See Taggart,* 139 S.Ct. 1795, 1802
21 ("principles of basic fairness require that those enjoined receive explicit notice of what
22 conduct is outlawed before being held in civil contempt") (citations and internal
23 quotation marks omitted).

24 Debtor himself proposed a valuation of <u>$215,000</u> of the subject property in his
25 bankruptcy schedules. *Freeman,* 608 B.R. 228, 230. Nationstar's predecessor in
26 interest ("BAC") "was unhappy that Debtor was arguing for a reduction in the value of
27 the secured portion of its claim below $215,000." *Id.* Nevertheless, after negotiations
28 during a continued confirmation hearing, Debtor's counsel represented, and BAC's

counsel agreed, that "we are in agreement to a consensual plan which provides a value of the [Property] at $190,000 ...." *Freeman,* 608 B.R. 228, 230-31 (internal quotation marks omitted, emphasis added). The Chapter 13 Trustee's counsel later stated, without objection, that all counsel "have agreed to value the [Property], for purposes of the cramdown, in the secured claim amount of $169,340 …." *Id.* at 231 (emphasis added). But, as noted above, the inserted language itself provides different dollar amounts for the "value" of the subject Property and the amount of the "secured claim":

> For purpose of plan confirmation, the value of the [Property] is determined to be $194,000. The amount of the secured claim which shall be paid, in full, during the life of the chapter 13 plan is $169,340, with interest at the rate of 6.75% for the remaining 48 months of the Chapter 13 Plan. [Confirmation Order, dkt. 73, p. 3, ¶ 1.b (emphasis added) (quoted in *Freeman,* 608 B.R. 228, 231).]

Of course, there are possible explanations for these different numbers. For example, although the record does not include any argument or calculation by Debtor to explain this disparity, the $194,000 value could be the agreed value as of the petition date, whereas the $169,340 could be the balance of the bifurcated secured claim by the time of confirmation. *See Freeman,* 608 B.R. 228, 231 at n. 3.

But the point is not what Nationstar could have understood if Debtor had offered an explanation. Rather, the point is that it is Debtor's burden to show, by clear and convincing evidence, that Nationstar had an "objectively unreasonable" understanding that its *in rem* lien rights survived Debtor's personal discharge – that there was no "fair ground of doubt" that the discharge injunction barred Nationstar from acting as it did. Debtor has not met that burden.

In sum, this Bankruptcy Court agrees with Nationstar that, at all relevant times, it was "sufficiently debatable" whether its lien survived Debtor's *in personam* discharge, such that Nationstar had an objectively reasonable basis for concluding that its conduct was lawful. *See Ahn v. Sanger*, 794 Fed.App'x 661, 663 (9th Cir. 2020). Debtor has not established otherwise by clear and convincing evidence.

6. CONCLUSION

Debtor's motion for sanctions is being DENIED by separate order issued concurrently with this Memorandum Decision.

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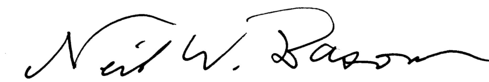
Date: September 4, 2020



Neil W. Bason
United States Bankruptcy Judge