2:30 pm

8:10-13288 **Jeffrey W. Evans** **Chapter 13**

#107.00 CONT'D Hearing RE: Confirmation of Chapter 13 Plan

FR: 5-19-10; 6-16-10; 7-21-10; 8-25-10; 10-27-10; 11-23-10

Docket #: 2

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

November 23, 2010

Overrule objections of Trustee and confirm plan.

A. Background

On March 17, 2010, Debtors Jeff and Christine Evans ("Debtors") filed a voluntary Chapter 13 petition. The amended 60-month plan provides for $150.00, with zero percent to unsecured creditors. The plan also provides for secured claimants Golden West Cities FCU, Wachovia Dealer Services and Litton Loan Servicing ("Litton") to be paid directly outside the plan.

The secured debt of Golden West Cities FCU and Wachovia Dealer Services claims is secured by vehicles, and the Litton loan is secured by a first deed of trust on real property located at 35483 Sumac Avenue, Murrieta, CA 92562 (the "Property"). The Property is rental property, being leased by unrelated third-parties. The Litton claim is in the amount of $440,308.00 and the value of the Property is $295,000. The Property is also encumbered by two junior liens totaling $160,642; by order of this court entered May 25, 2010, the junior liens are deemed wholly unsecured. Other general unsecured claims total $87,943.16.

On July 12, 2010, Chapter 13 trustee Amrane Cohen (the "Trustee") filed his objection to confirmation of the Debtors' proposed Chapter 13 plan, and filed a related Request for

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Dismissal. Debtors filed reply papers on August 18, 2010, and the matter was heard on August 25, 2010. The hearing was thereafter continued to October 27, 2010 and again to this date.

A. Debtors' Eligibility Under 109(e)

In order to be eligible to be in chapter 13, an individual must have noncontingent, liquidated, unsecured debt of less than $336,900 as of the date of the petition. 11 U.S.C. 109(e). The junior lienholder claims and general unsecured claims in this case total $248,585. The senior lienholder, Litton, is undersecured by approximately $145,308. If this amount is added to Debtors' other unsecured debt, the total unsecured debt will exceed that unsecured debt limits of Section 109 and Debtors will not be eligible to be debtors under chapter 13.

The Trustee, relying principally on the opinions in *In re Smith*, 419 B.R. 826 (Bankr. C.D. Cal. 2009) and *In re Scovis*, 249 F.3d 975 (9th Cir. 2001), argues that the unsecured portion of Litton's claim must be included in the 109(e) eligibility calculation.

Debtors respond that § 506(a), cited by both *Smith* and *Scovis,* provides that the value of a secured claim shall be determined in light of the purpose of the valuation and of the proposed disposition of the property. The conclusions re eligibility in *Smith* and *Scovis*, were based on the fact that the lien securing the debt was intended to be stripped off by the debtor in the Chapter 13 case. *In re Smith*, 416 B.R. at 832; *Scovis, supra*, 249 F.3d at 984. In both cases, the debtors attempted to claim secured status for claims which were to be crammed down in a Chapter 13 case. Here, Debtors argue, there is no such cram down being proposed, and thus mandating bifurcation of the claim under § 506 for § 109(e) limit analysis is inappropriate.

Debtors further argue that Litton's first-priority lien against the Property is a purchase money security for which there is no recourse against the Debtors under California law in the event of foreclosure. Debtors cite to a recent unpublished decision, *In re Medina*, 2010 Bankr. LEXIS 1128 (Bkrcty. N.D. Cal 2010), in which the bankruptcy court held that a purchase money deed of trust, with no recourse besides the collateral as established by California Code of Civil Procedure § 580b, is not appropriately bifurcated under § 506(a).

The court reasoned that "there is no rational basis for calling any part of the claim unsecured when applicable law forbids the debt from being enforced any way except secured." Id. at 3-4. Debtors thus argue that as there is no recourse for the Litton loan besides foreclosure, the loan should not be bifurcated under § 506(a) and should not be treated as unsecured.

This court agrees with the analysis in *Medina*.

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In *Medina,* the debtors' schedules indicated that their principal residence was encumbered by a purchase money loan secured by a first deed of trust. This loan was undersecured as the value of the property had dropped. The chapter 13 trustee, relying on *Scovis*, added the unsecured portion of the debt to the total unsecured debt, and moved to dismiss on the grounds that the debtors' total unsecured debt now exceeded the limits imposed by § 109(e). Observing that CCP § 580b renders a deed of trust securing a purchase money loan entirely without recourse, the court held that there was thus no rational basis for designating any portion of the claim unsecured when applicable law forbade the debt from being enforced in any way except as secured. State law clearly prohibited the creditor of a non-recourse, residential loan from pursuing any form of recourse except as secured by the property; accordingly, such claim would also be prohibited by § 502(b)(1). Stated otherwise, if such claim by a creditor would be prohibited in its entirety, there existed no basis for using that claim for the purpose of determining eligibility for 109(e) purposes.

Indeed, deficiency claims have been allowed in bankruptcy only to the extent that state law permits them. See Tidewater Finance Co. v. Kenney, 531 F.3d 312, 320 (4th Cir. 2008) (creditor had right to a deficiency judgment against debtor where expressly assented to in an underlying contract, enforceable under Virginia law); In re PCH Associates, 949 F.2d 585, 604 (2nd Cir. 1991) (where financing for a hotel was advanced on a non-recourse basis, a creditor would be barred from pursuing a deficiency judgment, and would thus be barred from filing an unsecured claim for the deficiency in bankruptcy proceedings). In re Weinstein, 227 B.R. 284, 292 (9th Cir. BAP 1998), further affirmed, stating: "With respect to the unsecured portion of the undersecured creditor's claim, the treatment of that claim in bankruptcy would depend on whether the creditor did or did not have recourse...Because § 502(b)(1) disallows any claim to the extent that it is

unenforceable against the debtor or the debtor's property under any agreement or under applicable nonbankruptcy law, the undersecured creditor with a nonrecourse unsecured claim would not be entitled to a distribution in bankruptcy." Id. See also In re. Bloomingdale Partners, 155 B.R. 961, 969 (Bankr. N.D. Ill. 1993) (§ 502(b)(1) prohibits a creditor holding nonrecourse claims from asserting claims against the estate beyond the value of its collateral). In In re Allen-Main Associates Ltd. Partnership, 223 B.R. 59 (2nd Cir. BAP 1998), the Second Circuit relied on the legislative purpose behind § 502(b)(1) in denying a nonrecourse creditor its' attempt to file an involuntary Chapter 7 petition against the debtor, stating, "Specifically, the legislative history with respect to the amendment of Code § 502(b)(1) in 1978 indicates that a claim is to be disallowed to the extent that such claim is unenforceable against the debtor and unenforceable against property of the debtor. This [amendment] is intended to result in the disallowance of any claim for deficiency by an undersecured creditor on a non-recourse loan or under a State anti-deficiency law...since neither the debtor, nor the property of the debtor, is liable for such deficiency." Id. at 63.

CCP § 508b is not restricted to principal residences. The plain language of the statute extends such protection to three categories of debtors: 1) a "purchaser" in a "sale of real property or an estate" who fails to "complete his or her contract of sale"; 2) a deed of trust given to a vendor to secure payment of the balance of the purchase price of that real property or estate [see, e.g., Long v. Superior Court, 170 Cal. App. 3d 499 (1985); Spangler v. Sherwin, 7 Cal.3d 603 (1972)]; or 3) a deed of trust on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser. CCP § 508b.

Party Information

Debtor(s):

Jeffrey W. Evans — Represented By

Arnold H Wuhrman

Joint Debtor(s):

Christene Marie Evans — Represented By

Arnold H Wuhrman

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Trustee(s):

Amrane Cohen