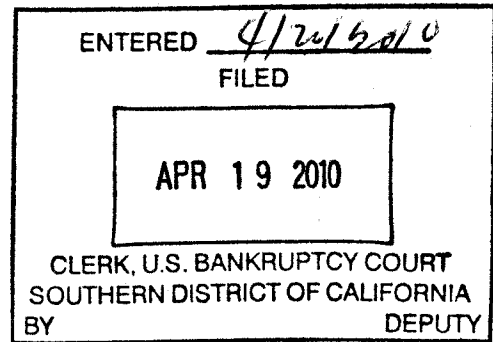


WRITTEN DECISION - FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

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In re)	Case No. 10-00367-LA13
)	R/S No. RTL-1
PATRICIA MARIE CASEY,)	
)	
Debtor.)	ORDER ON MOTION FOR RELIEF
)	FROM STAY
_____)	
CHRISTINE GRANDSTAFF, her)	
successors and/or assigns,)	
)	
Movant.)	
)	
v.)	
)	
PATRICIA MARIE CASEY,)	
MARY J. JONES,)	
THOMAS H. BILLINGSLEA, JR.,)	
Chapter 13 Trustee,)	
)	
Respondents.)	
_____)	

Creditor Christine Grandstaff has moved for relief from the automatic stay so she can foreclose on her third position trust deed. Debtor has valued the property in her Schedules at \$230,000, and according to Grandstaff there is a \$218,000 first

1 position note, and a \$236,000 second ahead of Grandstaff's third
2 position note for \$20,000, which has grown to \$30,698. Debtor
3 agrees there is no equity in the property to which Grandstaff's
4 lien may attach, but offers different figures and creditors.

5 At the core of Grandstaff's motion is the assertion that
6 debtor is not eligible for a discharge in Chapter 13 because
7 she received a discharge in Chapter 7 in 2009. The fact of the
8 discharge is not controverted, nor is the legal conclusion,
9 because 11 U.S.C. § 1328(f) expressly so states. Grandstaff's
10 next argument is that debtor cannot use the lien strip mechanisms
11 of the Bankruptcy Code precisely because she is not eligible for
12 a discharge. Grandstaff asserts that she is therefore entitled
13 to relief from stay.

14 The Court has subject matter jurisdiction pursuant to
15 28 U.S.C. § 1334 and General Order No. 312-D of the United States
16 District Court for the Southern District of California. This is
17 a core proceeding under 28 U.S.C. § 157(b)(2)(G).

18 Grandstaff's core proposition reaches too far. In essence,
19 she says that if a debtor cannot receive a discharge, a debtor
20 cannot file a Chapter 13 case and avail herself of the features
21 of a Chapter 13 proceeding. Such an argument asserts, in effect,
22 that a debtor has to be eligible for a discharge in order to be
23 eligible to file a Chapter 13 petition. This Court disagrees,
24 and joins others who have persuasively held that availability of
25 a discharge is not an issue of eligibility to file a Chapter 13

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1 case. In re Bateman, 515 F.3d 272 (4th Cir. 2008); In re Lewis,
2 339 B.R. 814 (Bankr. S.D. GA 2006).

3 Grandstaff cites to In re Jarvis, 390 B.R. 600 (Bankr. C.D.
4 IL 2008), to In re King, 290 B.R. 641 (Bankr. C.D. IL 2003), and
5 In re Akram, 259 B.R. 371 (Bankr. C.D. CA 2001) in support of her
6 argument that a discharge is required. Those cases are important
7 cases to the circumstance when a debtor is not eligible for a
8 discharge, such as here. However, they actually support the
9 proposition that eligibility for a discharge is not an
10 eligibility prerequisite to being able to file a Chapter 13 case,
11 whether under 11 U.S.C. § 109 or otherwise. Rather, they speak
12 to the relief a debtor can seek in a Chapter 13 when no discharge
13 is available, most commonly in what is colloquially called a
14 "Chapter 20" case. A "Chapter 20" case is one where a debtor has
15 received a discharge in a Chapter 7 case, and then files a
16 Chapter 13 within the time period set in 11 U.S.C. § 1328(f)
17 prohibiting a further discharge. This case is a "Chapter 20"
18 case.

19 A central issue of a "Chapter 20" case is whether "the
20 action of the debtor in filing the petition was in good faith"
21 [11 U.S.C. § 1325(a)(7)], and whether "the plan has been
22 proposed in good faith and not by any means forbidden by law"
23 [§ 1325(a)(3)]. In order to understand the parameters of those
24 good faith tests, it is important to understand what happens at
25 the end of a Chapter 13 case where a debtor is not eligible for a
26 discharge. The Ninth Circuit has recognized:

1 A Chapter 13 case concludes in one of
2 three ways: discharge pursuant to § 1328,
3 conversion to a Chapter 7 case pursuant to
 § 1307(c) or dismissal of a Chapter 13 case
 "for cause" under § 1307(c).

4 In re Leavitt, 171 F.3d 1219, 1223 (9th Cir. 1999).

5 If a debtor successfully completes a Chapter 13 plan and
6 is eligible for a discharge, the debtor receives a discharge from
7 liability for all dischargeable debts, regardless of how little
8 was paid on them through the life of the plan. If a debtor is
9 not eligible for a discharge, however, then the case has to end
10 some other way, as the Ninth Circuit stated. One way might be
11 conversion to Chapter 7, but as the Leavitt court recognized,
12 conversion is not possible where the debtor had received a
13 Chapter 7 discharge less than 7 years before [now 8 years, under
14 § 727(a)(8)]. So discharge under Chapter 13 and conversion are
15 out of consideration. That leaves dismissal. Section 1307(c)
16 of Title 11, United States Code, provides a non-exhaustive list
17 of grounds for dismissal for cause, including "unreasonable delay
18 by the debtor that is prejudicial to creditors". Moreover,
19 11 U.S.C. § 349, made applicable to Chapter 13 cases by 11 U.S.C.
20 § 103, describes the effect of dismissal, and makes clear that
21 dismissal restores as completely as possible the *status quo* at
22 the time of filing. In relevant part, it states:

- 23 (b) . . . a dismissal of a case -
24 (1) reinstates -
 (A) any proceeding . . .
25 (B) any transfer provided under section 522,
 544, 545, 546, 548, 549 or 724(a) . . .
26 (C) any lien avoided under section 506(d) of
 this title;

- 1 (2) vacates any order, judgment, or transfer
ordered, . . . , and
2 (3) reverts the property of the estate in the
entity in which such property was vested
3 immediately before the commencement of the
case under this title.
4

5 Under the Bankruptcy Code, there are two ways to make an
6 enforceable debt go away permanently. One is to pay it, in full.
7 The other is to obtain a discharge of any remaining obligation.
8 In the case of a "Chapter 20", there can be no discharge, and
9 conversion is not an option. Dismissal is the necessary result,
10 without discharge, when a debtor performs a plan that leaves one
11 or more debts wholly or partially unpaid. Any other outcome
12 would give the debtor a *de facto* discharge when by statute no
13 discharge is available.

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

19 Where a debtor does not receive a
20 discharge, however, any modifications to a
creditor's rights imposed in the plan are not
21 permanent and have no binding effect once the
term of the plan ends. See In re Ransom, 336
22 B.R. 790 (9th Cir. BAP 2005) (post petition
interest on nondischargeable student loan
continued to accrue at the contract rate and
23 could be collected after Chapter 13 case
terminated); In re Holway, 237 B.R. 217
24 (Bankr. M.D. Fla. 1999) (tax debt continued
to accrue interest and penalties postpetition
25 where debtor did not receive Chapter 13
discharge); In re Place, 173 B.R. 911 (Bankr.
26 E.D. Ark. 1994) (where Chapter 13 case was

1 dismissed without discharge, accrual of
2 interest on tax debt was not affected by
3 pendency of bankruptcy case).

3 378 B.R. at 236. The Lilly Court concluded:

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

16 378 B.R. at 236-37.

17 As already stated, this Court agrees with the reasoning of
18 the Lilly court. A debtor may file a Chapter 13 petition when
19 no discharge is available because of a prior discharge in a
20 Chapter 7. A Chapter 20 debtor may propose to invoke various
21 otherwise applicable provisions of the Bankruptcy Code during the
22 pendency of the case, but without a discharge the only way to
23 make the debt go away is to pay it in full at the amount it would
24 be under nonbankruptcy law.

25 The Court's conclusion is buttressed by a number of relevant
26 decisions which have looked at nondischargeable debts. In

1 Bruning v. United States, 376 U.S. 358 (1964), the debtor had
2 been assessed for prepetition unpaid taxes. During bankruptcy a
3 small portion of the debt was paid on the IRS claim pursuant to a
4 proof of claim filed by the IRS. The debtor acknowledged his
5 liability on the underlying debt but contended the IRS could not
6 seek postpetition interest on that debt since it chose to file a
7 claim and receive a distribution. Writing for a unanimous court,
8 Chief Justice Warren wrote that debtor's personal liability for
9 postpetition interest on the nondischargeable debt remained the
10 debtor's personal obligation.

11 In re Pardee, 218 B.R. 916 (9th Cir. BAP 1998) involved a
12 Chapter 13 plan that provided for full payment of the principal
13 and prepetition interest on a nondischargeable student loan.
14 Even though the plan paid that debt in full, postpetition
15 interest accrued over the life of the plan and was itself
16 nondischargeable. It was the personal liability of the debtor
17 and could be collected from him post-discharge.

18 The Ninth Circuit Court of Appeals reached the same
19 conclusion with respect to a Chapter 13 debtor who made full
20 payment of a child support debt. Again, postpetition interest
21 accrued and could be collected post-discharge from the debtor.
22 In re Foster, 319 F.3d 495 (9th Cir. 2003).

23 The Bankruptcy Appellate Panel of the Ninth Circuit
24 reiterated its holding in Pardee in In re Ransom, 336 B.R. 790
25 (2005), rev'd on other ground in Espinosa v. United Student Aid
26 Funds, Inc., 553 F.3d 1193 (9th Cir. 2008), again holding that

1 postpetition interest accrued during the life of the Chapter 13
2 plan and was the personal obligation of the debtor post-
3 discharge.

4 Congress has determined that a debtor who files a Chapter 13
5 within four years of obtaining a discharge in a Chapter 7 is not
6 eligible for a Chapter 13 discharge. That makes the debtor's
7 debts nondischargeable in that case to the same effect as student
8 loans, child support, or nondischargeable tax obligations. Any
9 other conclusion would violate 11 U.S.C. § 1328(f) by granting a
10 *de facto* discharge where one is expressly excluded.

11 The foregoing answers the specific question posed by
12 Grandstaff in this motion, which was whether the process of
13 Chapter 13 and a lien strip is even available to a debtor who
14 is not eligible for a discharge. In this Court's view, the
15 answer is that a debtor may file a Chapter 13 although not
16 eligible for a discharge, subject to all the requirements of
17 11 U.S.C. § 1325, as well as the rest of the Bankruptcy Code.
18 The instant motion for relief from stay does not require the
19 Court to set out what the parameters are for a debtor to
20 undertake such a filing. The Court has already noted the good
21 faith requirements of § 1325(a)(3) and (a)(7). Suppose a debtor
22 were to propose a plan invoking § 1322(b)(2) or, perhaps,
23 § 506(d) to avoid a creditor's secured interest and treat it as
24 an unsecured claim. In theory, that may be permissible, but
25 whether it is will turn on how the debtor proposes to pay the
26 creditor. For example, if the debtor proposes to pay the debt in

1 full over the life of the plan, such a plan may well be in good
2 faith if feasible. On the other hand, would a plan be in good
3 faith if it proposed to pay the creditor little or nothing over
4 the term of the plan, in effect postponing or delaying payment of
5 the nondischargeable debt owed to the creditor? Would that
6 constitute unreasonable delay under § 1307(c)? Those questions,
7 and others, are left for a motion or case where they are squarely
8 presented.

9 Ms. Grandstaff has asserted that the instant case was filed
10 in bad faith, and argues that bad faith is a ground for granting
11 relief from stay. As a general proposition, the Court agrees
12 that bad faith may be a ground for granting relief from stay.
13 In re Little Creek Development Co., 779 F.2d 1068 (5th Cir.
14 1986); In re ACI Sunbow, LLC, 206 B.R. 213 (Bankr. S.D. CA 1997).
15 Whether the case presents a record of bad faith remains to be
16 determined. Debtor has generally asserted that she filed in good
17 faith, but has not responded to any of Ms. Grandstaff's arguments
18 concerning feasibility of the proposed plan, amount and identity
19 of liens on the subject property, or change in claimed expenses.

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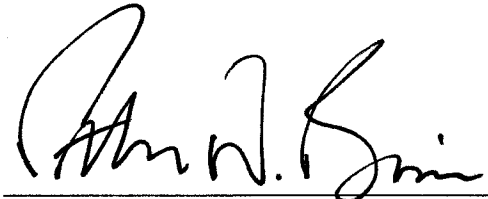
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1 Because the Court concludes that a debtor may file a Chapter
2 13 petition and may seek to invoke the lien strip authorization
3 of 11 U.S.C. § 1322(b) even though the debtor is not eligible for
4 a discharge, the motion for relief from stay on that ground is
5 denied. The Court continues the hearing on the balance of this
6 motion to the date and time scheduled to hear the debtor's lien
7 strip motion, which presently is May 11, 2010, 3 p.m. in
8 Department 4. At that hearing, the court will determine what
9 further hearing on this motion is necessary.

10 IT IS SO ORDERED.

11 DATED: APR 19 2010



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14 PETER W. BOWIE, Chief Judge
15 United States Bankruptcy Court
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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re Case No. 10-00367-LA13

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER ON RELIEF FROM STAY

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

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Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on April 19, 2010.


Barbara J. Kelly, Judicial Assistant