

**IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN NATION**

TRIBAL CREDIT PROGRAM)	CAUSE NO. AP-11-0107 – CV
OF THE CONFEDERATED)	
SALISH AND KOOTENAI)	
TRIBES OF THE FLATHEAD)	OPINION
RESERVATION)	
Plaintiff/Appellee)	
)	
vs.)	
)	
ROBERT MICHAEL HOULE)	
Defendant/Appellant)	

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Honorable Winona Tanner, presiding.

Appearances:

Carolynn M. Fagan, Fagan Law Offices P.C., Attorney for the Appellant.

Ranald McDonald and Daniel Decker, Confederated Salish and Kootenai Tribes, Legal Department, Attorneys for the Appellee.

Before: Chief Justice Eldena Bear Don't Walk, Associate Justice Joey Jayne, and Associate Justice Robert McDonald.

I. INTRODUCTION

This Court, sua sponte, sets aside CSKT 1-2-803 which dictates the time the decision shall be rendered. The complexity of this matter required that the Court set aside the time limit in order to complete its decision.

Robert Michael Houle (hereinafter “Houle”), through his attorney, Carolynn Fagan, appeals that Tribal Court “Judgment and Decree of Foreclosure_(hereinafter “Judgment”)” issued on September 18, 2012. We VACATE that Judgment and REMAND this matter to the Trial Court with instructions to reissue a Judgment consistent with this Opinion.

II. STANDARD OF REVIEW

This Court reviews questions of law de novo, *CSKT v. Georgina Old Person*, CV – AP-09-1549 – CR (2011).

III. STATEMENT OF UNDISPUTED FACTS

Appellee, the Tribal Credit Program of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, (hereinafter “Tribal Credit”) operates Tribal Credit program for the Confederated and Kootenai Tribes (hereinafter “CSKT”).

Appellant, Houle, is an enrolled member of CSKT.

In November, 2008, Houle and Tribal Credit entered into a promissory note and mortgage. The real property that secured the mortgage is described as follows:

Tract 3: A tract of land in the S1/2E1/4NW1/4 of Section 32, Township 22 North, Range 19 East, P.M.M., Lake County, Montana described as follows: the true point of beginning being the NW1/6 Corner of said Section 32, thence N89°59’35’W 331.08 feet; thence N12°48’17’W 206.31 feet; thence S87°10’11’E 286.22 feet; thence S00°09’25’W 187.09 feet to the point of the beginning, containing 1.38 acres more or less, being subject to and together

with all appurtenant easements shown and of record (hereinafter referred to as “Tract 3”).

When Houle entered into the November 25, 2008, promissory note and mortgage, he contractually agreed to a pre-petition waiver as follows:

JURISDICTION/BANKRUPTCY: [Houle] acknowledges that the tribal lending program offers low interest rates and other benefits that are not available from most non-tribal lending agencies. As consideration for being able to participate in the tribal lending program, [Houle], (1) agrees not to attempt to discharge the debt created by this note by means of bankruptcy, and (2) agrees that future per capita and trust income attached by the Tribes as set forth above shall constitute a secured claim not dischargeable by bankruptcy.

On March 29, 2011, Tribal Credit filed a Complaint to Foreclose Mortgage and Promissory Note (hereinafter “Complaint”) against Houle. The Complaint sought monetary damages, costs incurred, sale of collateral and a deficiency judgment.

On May 10, 2011, Houle filed an Answer and Motion to Stay (hereinafter “Answer”) in which he denied the allegations in the Complaint and requested a stay of proceedings. This Answer included an attached Notice of Bankruptcy Case Filing, dated April 12, 2011, his voluntary petition, and a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines.

Houle listed Tribal Credit as a secured creditor in his bankruptcy and Tribal Credit received notice of same. Houle indicated in his bankruptcy filing that he intended to surrender Tract 3 to Tribal Credit.

Houle was discharged from bankruptcy on July 6, 2011. Tribal Credit and the Trial Court were both notified of Houle's discharge and both received copies of his discharge.

The Trial Court held a hearing on Tribal Credit's Complaint on June 14, 2012. On September 18, 2012, the Trial Court entered the above-referenced Judgment, granting Tribal Credit a money judgment in the amount of \$213,864.23, and a deficiency judgment against Houle. Houle filed a timely appeal of this Judgment on September 18, 2012. ¹

IV DISCUSSION

Both parties agree that federal bankruptcy code applies to Tribes, and that federal court orders under the bankruptcy code are applicable within "Indian Country," ² *In re Sandmar Corporation*, 12 B.R. 910 (Bankr., D.N.M. 1981). Both parties also agree that Congress has abrogated Tribal sovereign immunity as to sections 506 and 524 of the bankruptcy code. *Krystal Energy Co. v. Navajo Nation*, 357 F.2d 1055, 1061 (9th Cir. 2004).

¹ Tribal Credit argues that other factors such as a purported well use agreement, and that Tribal Credit tried to work with Houle, are somehow relevant. This Court disagrees that these asserted factual issues have any relevance to the matter before us.

² "Indian Country" is defined by several federal statutes roughly as those lands within the exterior borders of a tribal reservation.

However the parties disagree as to whether the Trial Court had subject matter jurisdiction to issue its Judgment, and whether Houle could contractually waive his right to a bankruptcy discharge.

Tribal Credit urges this Court to uphold the Trial Court arguing, *inter alia*, that the Trial Court, in issuing its Judgment, may have taken in certain factors, such as the inability of tribal member to get loans from other lenders than Tribal Credit, or the fact that Tribal Credit foreclosures are not reported to credit bureaus. If the Trial Court already had jurisdiction, these factors might be relevant. However, as we must decide whether the Trial Court had subject matter jurisdiction in the first place, these factors are simply not relevant.

Tribal Credit also argues that Houle contractually waived his right to a discharge, and that even though federal cases have held such a waiver unenforceable, such waivers are not invalid *per se*. *In re: South East Financial Associates*, 212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997). Tribal Credit, however, does not discuss, or provide any authority on, what *per se* might mean for this Court in the instant matter.

Tribal Credit also appears to argue that because some federal courts have held that a bankruptcy automatic stay may be waived by pre-petition waivers, See, *In re: Frye*, 320 B.R. 786, 791 (Bankr. D. Vt 2005), by implication pre-petition

waivers of discharge must be enforceable as well. However, Tribal Credit provides no authority for its implied waiver argument.

Tribal Credit also argues that we should rule that, to ensure Tribal Credit receives a legally binding conveyance of Tract 3, it should receive a deed in lieu of foreclosure, or other similar document, approved by an appropriate representative of the Bureau of Indian Affairs. However, as this issue was never presented to the Trial Court, we decline to entertain, or rule on, this argument.

Houle argues that Tribal Credit's only right is to possession of the collateral, and that any other amounts owed by Houle to Tribal Credit are unsecured claims and thus discharged by Houle's bankruptcy.

Houle also argues that *In re: Cole*, 226 B.R. 647 (9th Cir. BAP 1998) should control the disposition of this matter, in that pre-petition waivers are against public policy and therefore cannot be enforced. Tribal Credit acknowledges *In re: Cole*, but argues that it is limited to pre-petition waivers contained in a stipulated judgment in state court litigation. Again, Tribal Credit has offered no legal authority to substantiate this assertion.

Finally, Houle argues that federal bankruptcy law acts as an injunction against the Trial Court in this matter, thereby depriving it of jurisdiction, and that by holding a hearing and in issuing its Judgment, the Trial Court violated this statutory injunction.

A. The Nature of Houle's Debt.

We first must discuss whether the entire \$213,864.23, claimed by Tribal Credit is a secured or unsecured claim. The reason for this is if the claim is secured, although the debt is discharged, Tribal Credit retains the right to the collateral – here Tract 3. If all, or portions, of the \$213,864.23 are unsecured claims, Tribal Credit only has a secured claim to the extent of the collateral.

The Bankruptcy Code states:

[An] allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's in the estate's interest in such property, . . . and is an unsecured claim to the extent of the creditor's interest . . . is less than the amount of such allowed claim.

11 U.S.C. § 506(a)(1) . Although the meaning of this section is not exactly crystal clear on its face, the U.S. Senate has clarified it, to wit: “Subsection (a) of this part separates an undersecured creditor's claim into two parts: He has a secured claim to the extent of his collateral; and he has an unsecured claim for the balance of his claim.” Senate Report No. 95-989.

The Bankruptcy Code also states: “[E]xcept as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from *all debts* that arose before the date of the order for relief under this chapter (*emphasis added*).” 11 U.S.C. § 727(b).

It is clear that Houle had personal liability for a secured debt just as he would for any other debt. This is what obligated him pay the debt to Tribal Credit. However, bankruptcy discharges this personal liability. Once Houle's personal liability is eliminated, Tribal Credit cannot sue him to collect the debt.

The second part of Houle's secured debt is Tribal Credit's legal claim to Tract 3 which serves as collateral for Houle's debt. This gives Tribal Credit the right to repossess Tract 3, or force its sale, as Houle did not pay his debt. Liens are not affected by the bankruptcy discharge. In other words, by failing to remain current on payments, Houle can still lose the property, even if the debt itself is discharged.

Accordingly, Tribal Credit sole right is to repossess, or force the sale, of Tract 3. Any remaining debt claimed by Tribal Credit, including any claims to Houle's per capita payments, lease and sale monies, and any funds over which the CSKT currently have jurisdiction, or shall have jurisdiction in the future and any other assets owned by Houle which may be subject to levy or attachment, are unsecured claims which have been discharged by Houle's bankruptcy.

B. Is Houle's November 25, 2008, Pre-petition Waiver Valid and Enforceable?

The enforceability of prepetition waivers of the right to seek relief in Bankruptcy Court or the waiver of specific bankruptcy benefits has produced substantial litigation. Some courts have held that such prepetition waivers of

bankruptcy benefits are unenforceable. *In re Cole*, 226 B.R. 647 (9th Cir. 1998), *See, Matter of Pease*, 195 B.R. 431, 432 (Bankr.Neb.1996).

However, some courts have found that prepetition waiver of bankruptcy benefits are valid and enforceable. *See In re Gulf Beach Development Corp.*, 48B.R. 40 (Bankr.M.D.Fla.1985). However, in those cases, the secured creditor was not relying solely upon the language of the prepetition waiver and instead, made an independent showing of bad faith. *See e.g. In re University Commons, L.P.*, 200 B.R. 255 (Bankr.M.D.Fla.1996).

Prepetition waivers are not invalid per se. *See, In re Powers*, 170 B.R. 480. However, in *In re Powers, Id*, the judge cited public policy reasons for encouraging “workout agreements” between creditors and debtors when he ruled that, in that case, pre-petition waivers of automatic stay provisions were enforceable.

In *In re Cole*, supra, the 9th Circuit also looked at public policy reasons in determining whether a prepetition waiver of a bankruptcy discharge was enforceable.

Finally, an exception to discharge impairs the debtor’s fresh start and should not be read more broadly than necessary to effectuate policy, e.g., preventing debtors from avoiding debts incurred by fraud or other culpable conduct. (*citations omitted*). . . . One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort. . *Local Loan Co. v. Hunt*, 292 U.S. 234, (*citations omitted*). This policy is also embodied in the Code. For the foregoing reasons, we conclude that a prepetition waiver of the dischargeability of a debt undermines the purpose of the Code to give an honest but unfortunate debtor a fresh start.

Id at 654

The 9th Circuit also addressed the legal underpinnings of enforcing prepetition waivers.

First, pursuant to §523 bankruptcy courts have exclusive jurisdiction to determine the dischargeability of claims arising under §523(a)(2) (*citations omitted*). Thus, the bankruptcy court must make a determination regarding the dischargeability of a §523(a)(2) claim notwithstanding a state court stipulated judgment *or prepetition agreement that purports to determine the dischargeability of a debt. . . .*

Second, there is no recognized exception for prepetition waivers of discharge or dischargeability. Section 702(b) states that *all* debts are dischargeable in bankruptcy unless specifically excluded under §523. See 11 U.S.C. §727(b)(*citations omitted*). . . . Section 523 enumerates the exceptions to discharge, but does not except from discharge those debts that the debtor not to be discharged in bankruptcy. See 11 U.S.C. §523(a). If bankruptcy courts enforced prepetition waivers of discharge, they would effectively be creating an exception to discharge that Congress had not enumerated.

In addition, Congress has only provided two methods for a debtor to waive the discharge of all debts or the dischargeability of specific debts. Section 727(a)(10) permits a debtor to waive the discharge of *all* debts simply by executing a post bankruptcy written agreement that is approved by the bankruptcy court. See 11 U.S.C. § 727(a)(10). Similarly, a debtor may

waive the dischargeability of a *specific* debt if the waiver satisfies the reaffirmation requirements of § 524(c). *See* 11 U.S.C. § 524(c).

Where Congress has failed to include language in statutes, it is presumed to be intentional when it has used such language elsewhere in *654 the Code. (*citations omitted*) . . . Here, Congress' failure to authorize prepetition waivers of discharge, while at the same time authorizing certain postpetition waivers of discharge pursuant to §§ 524(c) and 727(a)(1), must be viewed as intentional.

Sections 524(d) and (c) "have been applied strictly by the courts to carry out their remedial purposes and to ensure that they are not evaded by agreements which, though not labeled as reaffirmations, have the effect of waiving the protections of the discharge." . . . Where Congress has failed to include language in statutes, it is presumed to be intentional when it has used such language elsewhere (*emphasis added*).

Id at 653 and 654

We do not agree with Tribal Credit that *In re Cole* is limited to pre-petition waivers contained in a stipulated judgment in state court litigation, as *In re Cole* speaks directly to this issue: "Thus, the bankruptcy court must make a determination regarding the dischargeability of a §523(a)(2) claim notwithstanding a state court stipulated judgment *or a prepetition agreement that purports to determine the dischargeability of a debt (emphasis added).*" *Id* at 653

It is our Opinion that *In re Cole* is far more persuasive, and more directly on point, than *In re Powers* cited above, and accordingly will control our decision here, in that the pre-petition waiver executed by Houle on November 25, 2008, is invalid and unenforceable as a matter of public policy and law.

C. What Is The Jurisdiction of the Trial Court in This Matter?

“A discharge ... 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.” 11 U.S.C. § 524(a)(2). Both parties agree, as does this Court, that Congress has expressly abrogated the immunity of Indian Tribes through bankruptcy code sections §§ 506 and 524. *Krystal Energy v. Navajo Nation, supra* at 1056. Therefore, the Tribal Court is effectively enjoined by the bankruptcy discharge from taking any collection action against Houle.

Accordingly, as Tribal Credit’s only remaining legal claim against Houle is the collateral, the Tribal Court’s jurisdiction here would be to ensure that Tribal Credit can timely repossess, or force a sale of, Tract 3.³

V. CONCLUSION.

Tribal Credit’s sole remaining right is to repossess, or force the sale, of Tract 3. Any remaining debt claimed by Tribal Credit, including any claims to Houle’s

³ "The record shows Tribal Credit was aware that Houle filed for bankruptcy, despite the language of the 2008 promissory note and mortgage, and indeed it filed a proof of claim. However, for reasons not readily apparent in the record, it chose not to file an objection to Houle's discharge with the bankruptcy court. We venture no opinion as to whether such an objection would have been successful, rather we only encourage Tribal Credit in the future to not forgo any legal opportunity to protect its assets.

per capita payments, lease and sale monies, and any funds over which the CSKT currently have jurisdiction, or shall have jurisdiction in the future and any other assets owned by Houle which may be subject to levy or attachment, are unsecured claims which have been discharged by Houle's bankruptcy.

The pre-petition waiver executed by Houle on November 25, 2008, is invalid and unenforceable as a matter of public policy and law.

The Tribal Court's jurisdiction here is to ensure that Tribal Credit can timely repossess, or force a sale of, Tract 3.

The Tribal Court's "Judgment and Decree of Foreclosure" issued on September 18, 2012, is hereby VACATED and REMANDED back to the Trial Court with instructions to reissue a Judgment consistent with this Opinion.

It is so ORDERED this 14th day of August 2014.




Eldena N. Bear Don't Walk,
Chief Justice


Joey Jayne, Associate Justice


Robert McDonald, Associate Justice

Certificate of Mailing

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the OPINION to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, this 14th day of August, 2014.

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A handwritten signature in black ink that reads "Abigail Dupuis". The signature is written in a cursive style with a horizontal line underneath the name.

**Abigail Dupuis
Appellate Court Administrator**