



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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October 14, 2009

Mary N. Peacock, Esquire
Chadwick, Washington, Moriarty, Elmore & Bunn, P.C.
9990 Fairfax Boulevard, Suite 200
Fairfax, Virginia 22030

Vantha Than and Mary Sangbouasy
42031 Bushclover Terrace
Stone Ridge, Virginia 20105

RE: *Brambleton Cmty. Ass'n v. Than, et al.*, CL-2009-9174

Dear Ms. Peacock, Mr. Than, and Ms. Sangbouasy:

The parties are before the Court on an appeal from the Fairfax County General District Court, in which Plaintiff, Brambleton Community Association (“The Association”), has sued Defendant, Vantha Than (“Than”),¹ for Homeowners Association (“HOA”) dues on Than’s former home. The dues at issue accrued after Than petitioned for Chapter 7 bankruptcy relief but before his home was sold by foreclosure at public auction, during which time he owned the home but neither rented it out nor lived in it.

I. Background

Than purchased a home in Brambleton, Virginia (“The Home”), in an area governed by The Association’s HOA Declaration. Among other requirements, the

¹ While Defendant Vantha Than successfully moved to join Mary Sangbouasy (“Sangbouasy”) as a defendant in this case, Vantha Than was the sole owner of the property during the relevant period. As the HOA dues in this case arise out of ownership of the home in question, only the owner, Vantha Than, can be liable for them.

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Declaration required that all of the homeowners subject to its terms pay regular HOA dues. Furthermore, Section 6.4(a) of the Declaration stated:

Each Owner shall be personally liable for all Assessments against such Owner's Lot. No Owner may be exempted from liability for the Assessment . . . by abandonment of the Lot . . . the Lot shall remain subject to a lien for the amount owed to the Association in accordance with this section until such amount has been paid.

Additionally, Section 12.1 of the Declaration stated that an owner's failure to timely pay HOA dues gave The Association the right to collect attorneys' fees if it prevailed in a suit for the untimely payments.

Than petitioned for Chapter 7 bankruptcy relief on May 17, 2007, and was granted discharge on August 22, 2007. Than did not reside in or rent out The Home at any point after petitioning for Chapter 7 bankruptcy relief. However, Than held record title to The Home until May 7, 2008, when it was sold at public auction pursuant to foreclosure proceedings. During this time, the home accrued \$1,666.89 in unpaid HOA dues after the filing of Than's petition in bankruptcy ("post-petition HOA dues").²

II. Analysis

The HOA Declaration in this case is binding on the parties pursuant to VA. CODE ANN. § 55-515(A). Than asserts that the post-petition HOA dues should be dischargeable in bankruptcy, while The Association claims that the dues are non-dischargeable debts. Both parties rely on the rationale of the court's opinion in *In re Rivera*, 256 B.R. 828 (Bankr. M.D. Fla. 2000). In *Rivera*, the Bankruptcy Court for the Middle District of Florida held that HOA dues were not dischargeable when they accrued between the time a debtor filed for bankruptcy and when he ceased to be the owner of the lot in question. *Id.* at 830, 835-36; *see also In re Rosenfeld*, 23 F.3d 833, 835-36 (4th Cir. 1994) (holding that housing cooperative dues were not dischargeable when they accrued between the time a debtor filed for bankruptcy and when he gave up record title to the property in question).

The *Rivera* court noted that there are three lines of cases that address whether HOA dues are dischargeable. *Id.* at 831-32. Under the rationale advanced in the first line of cases, if a court concludes that HOA dues arise from a "covenant running with the land," and the debtor continues to own the land after petitioning for bankruptcy, then dues that arise after the debtor petitions for bankruptcy but before the debtor loses ownership of the property cannot be discharged, as they are post-petition debts. *Id.* at 831. Pursuant to the analysis in the second line of cases, if a court concludes that HOA dues arise from a contract signed before the bankruptcy filing but the dues are not specifically tied to the land, then they can be discharged in bankruptcy, as the contract as

² The Association only seeks post-petition HOA dues. The parties have stipulated that post-petition HOA dues in this case total \$1,666.89.

a whole is a pre-petition debt. *Id.* In the third line of cases, some courts have held that a debtor is not liable for HOA dues unless the individual has “resided in or leased the unit” after petitioning for bankruptcy relief. *Id.* at 832; *see also In re Eno*, 269 B.R. 319, 320-21 (Bankr. M.D. Pa. 2001) (explaining the rationale behind these three lines of cases).

Relying on the first line of cases, The Association argues that Than is liable because the HOA dues are tied to the land. Than, relying on the third line of cases, responds that he is not liable because he did not reside in or rent out the property after filing the bankruptcy petition.

This Court finds both arguments unpersuasive as the three lines of cases that *Rivera* discusses have been superseded by a 2005 Amendment to 11 U.S.C. § 523(a)(16). Section 523(a) lists a variety of debts that cannot be discharged in bankruptcy, including:

... a fee or assessment that becomes *due and payable after the order for relief* to a membership association with respect to the debtor’s interest in a unit that has condominium ownership, in a share of a cooperative corporation, or *a lot in a homeowners association*, for as long as the debtor or the trustee has a *legal, equitable, or possessory ownership interest* in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case[.]
§ 523(a)(16) (emphasis added)

In other words, Than is not discharged from his post-petition HOA dues if The Association can prove that three requirements are met. First, the dues must constitute HOA, condominium, or cooperative housing dues. Second, the dues must become due or payable after the order for relief, to wit, upon a debtor commencing a voluntary case under the Bankruptcy Code by the filing of a petition. 11 U.S.C. § 301. Third, these dues must accrue while Than holds a “legal, equitable, or possessory ownership interest” in the home. Congress clearly intended “legal, equitable, or possessory interest” as a broad definition of ownership. An earlier version of § 523(a)(16) only excluded from discharge dues that were payable while the debtor (1) physically occupied the dwelling unit; or (2) rented the dwelling unit and received rent.³ Thus, the prior version of the

³ Section 523(a)(16) formerly prohibited the discharge of:

... a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which--

(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period. Pub. L. No. 103-394, § 309, 108 Stat. 4106, 4137 (1994).

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statute only prohibited discharging dues that arose while the debtor was asserting a type of "possessory interest." See BLACK'S LAW DICTIONARY 1203 (Defining possessory interest as "[t]he present right to control property, including the right to exclude others . . ."). However, in the current version of § 523(a)(16), Congress not only excluded from discharge dues arising as a result of a possessory interest, but also those resulting from a legal or equitable interest. This is a much broader exclusion, as the definition of legal interest includes "[a]n interest recognized by law, *such as legal title.*" BLACK'S LAW DICTIONARY 829 (emphasis added); cf. *Rosenfeld*, 23 F.3d at 838 ("even if Rosenfeld has not exercised the benefits of ownership, as *title holder he has the legal right to do so*") (emphasis added).

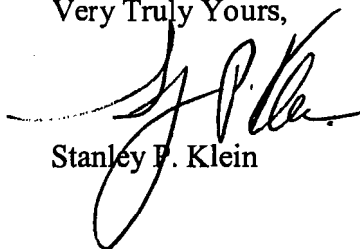
The Association has clearly satisfied the first requirement, as the dues in question are HOA dues. It has also met the second requirement as all of the claimed dues arose after the bankruptcy court's order for relief was entered on May 17, 2007. Finally, the Association has satisfied the third requirement. Than had record title of The Home until it was sold at public auction on March 7, 2008, so he had a cognizable legal interest in The Home until that date. Accordingly, Than is responsible for the HOA fees that accrued between May 17, 2007 and March 7, 2008.

The Association also seeks a recovery of attorneys' fees. The prevailing party in a suit for HOA dues "shall be entitled to recover reasonable attorneys' fees and costs." VA. CODE ANN. § 55-515(A). As the parties stipulated that the amount of attorneys' fees properly recoverable is \$1,054.00, The Association is also entitled to an award of attorney's fees in that amount.

III. Conclusion

Accordingly, for the reasons set forth above, the Court grants Brambleton Homeowners Association judgment against Vantha Than in the sum of \$1,666.89 in HOA dues, plus \$1,054.00 in attorneys' fees.⁴ As Sangbouasy never had a legal interest in the subject property, the Court finds for Sangbouasy. Enclosed is a copy of the Order entered this date granting judgment against Than but finding for Sangbouasy.⁵

Very Truly Yours,



Stanley P. Klein

⁴ The parties stipulated that if The Association prevailed in this case, judgment would be for \$1,666.89 in unpaid HOA dues plus \$1,054 in attorney's fees. Accordingly, this Court will not address the issue of prejudgment interest.

⁵ If debtors in the future wish to attempt to avoid these fees, they may consider doing as the court in *Rosenfeld* suggested: after petitioning for bankruptcy, the debtor "must transfer title to the property, if necessary by a deed in lieu of foreclosure." *Rosenfeld*, 23 F.3d at 838 (citations omitted).

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Brambleton Community)	
Association,)	
Plaintiff,)	
)	
v.)	CL-2009-9174
)	
Than, et al.,)	
Defendants.)	

FINAL ORDER

This cause came before the Court on an appeal from the Fairfax County General District Court. For the reasons set forth in the Court's Letter Opinion dated October 14, 2009, it is hereby

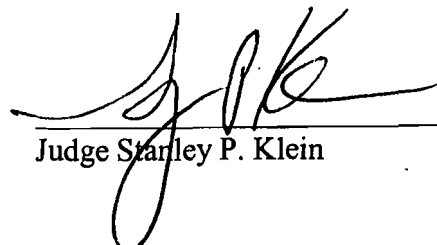
ORDERED that judgment be granted in favor of Plaintiff Brambleton Community Association against Defendant Vantha Than in the sum of \$1,666.89, plus \$1,054.00 in attorneys' fees.

It is further ORDERED that this cause of action be dismissed as to Defendant Mary Sangbouasy.

It is further ORDERED that the Clerk of the Court mail a certified copy of this order to counsel of record for the parties.

This Order is final.

ENTERED this 14th day of October, 2009.



Judge Stanley P. Klein

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.