

ORDERED PUBLISHED

AUG 16 2011

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-11-1021-HJoJu
)
 SALAHELDIN ABDELGADIR and) Bk. No. 09-23398-LBR
)
 AFAF WAHBI,)
)
 Debtors.)
)
 _____)
)
 BAC HOME LOANS SERVICING, LP)
)
 f/k/a Countrywide Home Loans)
)
 Servicing, LP,)
)
 Appellant,) **O P I N I O N**
)
 v.)
)
 SALAHELDIN ABDELGADIR; AFAF)
)
 WAHBI,)
)
 Appellees.)
)
 _____)

Argued and Submitted on July 20, 2011
at Las Vegas, Nevada

Filed - August 16, 2011

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

Appearances: _____
 Heidi Parry Stern of Akerman Senterfitt LLP argued
 for the appellant; Samuel A. Schwartz, The
 Schwartz Law Firm, Inc., argued for the appellees.

Before: HOLLOWELL, JOHNSON,¹ and JURY, Bankruptcy Judges.

¹ The Hon. Stephen L. Johnson, Bankruptcy Judge for the
Northern District of California, sitting by designation.

1 HOLLOWELL, Bankruptcy Judge:

2
3 BAC Home Loans Servicing a/k/a Countrywide Home Loans
4 Servicing, LP (BAC) appeals the bankruptcy court's order (1)
5 approving the debtors' motion to value and "cram-down" real
6 property subject to BAC's deed of trust, and (2) confirming their
7 chapter 11 plan of reorganization that modified BAC's claim.

8 The bankruptcy court determined that the debtors could
9 modify BAC's claim secured by the debtors' real property because
10 it found that at the time of plan confirmation, the debtors were
11 not using the property as their residence, exempting it from the
12 anti-modification provision of § 1123(b)(5).²

13 For the reasons outlined below, we conclude that the
14 appropriate time for determining whether property is a debtor's
15 principal residence is the petition date. Therefore, we REVERSE.

16 **I. FACTS**

17 Salaheldin Abdelgadir and his wife, Afaf Wahbi, (the
18 Debtors) filed for chapter 13 relief on July 27, 2009. On their
19 bankruptcy petition and schedules, the Debtors listed their
20 address as Las Palomas Drive in Las Vegas (the Property). The
21 Debtors scheduled the Property as the only real property they
22 owned. They scheduled an \$0 exemption in the Property.³

23 _____
24 ² Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
26 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

27 ³ Although the Debtors owned the Property in fee simple, the
28 exemption was taken under Nevada Revised Statute (NRS)

(continued...)

1 BAC holds a claim secured by a deed of trust on the Property
2 in the amount of \$739,748.⁴ According to the Debtors' schedules,
3 the Property is also subject to a second mortgage in favor of
4 Countrywide Home Lending (Countrywide) in the amount of \$175,979.
5 An appraisal of the Property, conducted on August 4, 2009, valued
6 it at \$425,000.

7 The Debtors' purchased the Property for \$704,050 in May
8 2006. The Debtors and BAC⁵ executed a promissory note, which was
9 secured by a first deed of trust on the Property. In connection
10 with the note and deed of trust, the Debtors filled out a form
11 titled "Occupancy Agreement," which certified that the Debtors
12 would:

13 occupy the [Property] as my primary year-round
14 residence, within (15) days of recording of the Deed of
15 Trust/Mortgage executed in connection with my loan.
16 This will confirm our understanding and agreement that
17 I intend to occupy the [Property] as my primary year-
18 round residence

19 When the Debtors purchased the Property, they were living in
20

21 ³(...continued)
22 21.090(1)(m), which exempts: "the dwelling of the judgment debtor
23 occupied as a home for himself or herself and family, where the
24 amount of equity held . . . does not exceed \$550,000 in value and
25 the dwelling is situated upon lands not owned by the judgment
26 debtor." It does not appear that the Debtors ever filed a
27 declaration of homestead under NRS 115.020(1) for the Property,
28 entitling them to an exemption under NRS 21.090(1)(1).

29 ⁴ BAC filed a proof of claim on August 21, 2009, in the
30 amount of \$739,748.80.

31 ⁵ The original lender was Countrywide Home Loan, Inc. For
32 reasons that are not clear in the record, BAC does not appear to
33 have succeeded to Countrywide's second deed of trust.

1 Wisconsin. Shortly after the sale on the Property closed, the
2 Debtors' son moved into the Property and lived there while
3 attending college.⁶ In January 2008, the Debtors moved from
4 Wisconsin to Las Vegas and moved into the Property.

5 After filing bankruptcy, the Debtors filed a motion to
6 modify Countrywide's claim. The motion asserted that the Debtors
7 "currently reside on a residential property at [Las Palomas
8 Drive]." They contended there was no equity in the Property and
9 proposed to "strip-off" Countrywide's second deed of trust as
10 wholly unsecured. Before the bankruptcy court ruled on the
11 motion, the Debtors sought conversion of their case to chapter 11
12 in order to "better manage the revaluation and reorganization of
13 their residential real estate." The bankruptcy court granted the
14 motion to convert on January 15, 2010.

15 On January 25, 2010, the Debtors filed a change of address
16 from the Property to a residence on Aruba Beach Avenue in Las
17 Vegas. The Debtors subsequently filed a second motion to value
18 collateral and modify the rights of secured creditors, BAC and
19 Countrywide (the Motion to Modify). This time, the Debtors
20 contended the Property was investment property, not subject to
21 the anti-modification provision of § 1123(b)(5). Because the
22 Property was appraised at \$425,000, the Debtors argued that BAC's
23 first deed of trust was undersecured. They proposed to bifurcate
24 BAC's claim to a \$425,000 secured claim and \$314,748 unsecured
25 claim. The Debtors also proposed to avoid Countrywide's second
26 mortgage and reclassify that claim as a general unsecured claim

27
28 ⁶ It is unclear if the Debtors' son paid rent.

1 in the amount of \$186,085.

2 BAC filed an opposition. First, BAC alleged that the value
3 of the Property was \$440,000, according to an appraisal done on
4 March 4, 2010. Additionally, BAC argued the Property was, at all
5 times, the Debtors' "principal residence" and protected from
6 modification. BAC questioned the residency of the Debtors,
7 noting that the Debtors did not amend their schedules to
8 demonstrate there were leases for either their occupancy of the
9 Aruba Beach property or the rental of the Property. The Debtors
10 filed a reply on April 1, 2010, and submitted the lease
11 agreements for Aruba Beach and the Property.

12 On March 9, 2010, the Debtors filed a plan of
13 reorganization. They filed an amended plan (Plan) on May 19,
14 2010. The Plan similarly proposed to cram-down BAC's claim to
15 the Property value of \$425,000. BAC objected, again contending
16 that even if the Debtors were allowed to modify its claim, which
17 it argued they were not, the value of the Property was \$440,000.

18 Prior to a hearing on the Motion to Modify and the Plan, the
19 Debtors and BAC filed additional briefing regarding the issue of
20 whether the Debtors could modify BAC's claim under § 1123(b)(5).
21 The Debtors took the position that whether the Property was a
22 principal residence for purposes of § 1123(b)(5) was a
23 determination to be made at the time of plan confirmation. BAC,
24 on the other hand, asserted that the character of property must
25 be determined at the time the creditor takes a security interest
26 in the collateral. Alternatively, BAC argued that the bankruptcy
27 court should look to the character of property as of the petition
28 date, since that is the date that exemptions are fixed. Either

1 way, BAC asserted that the Debtors could not circumvent
2 § 1123(b) (5) and modify its claim secured by the Property.

3 An evidentiary hearing on the Motion to Modify, combined
4 with a hearing on the Debtors' Plan and disclosure statement, was
5 held on July 1, 2010 (the Hearing). At the Hearing, the parties
6 stipulated to value the Property at \$440,000. Thus, the only
7 issue for resolution was whether, for purposes of § 1123(b) (5),
8 the Property was the Debtors' principal residence and at what
9 date that determination should be made.

10 The bankruptcy court acknowledged that, in connection with
11 Plan confirmation, the requirement of good faith must be
12 satisfied. "Good faith is always an issue . . . , if, for
13 example, somebody, you know, had a piece of property, and they
14 moved out, and then it was obvious they're going to move back the
15 next month, that raises an issue of good faith." Hr'g Tr. (July
16 1, 2010) at 17. To that end, the Debtors provided testimony
17 about their purchase of the Property and their residency there.

18 The bankruptcy court held a follow-up hearing on October 28,
19 2010, to set forth its findings of fact and conclusions of law
20 orally on the record. The bankruptcy court found that the
21 Debtors met all plan confirmation requirements and decided to
22 confirm their Plan. It allowed the modification of BAC's claim
23 because it concluded that the time to determine whether the
24 Debtors' Property was their principal residence was at the date
25 of confirmation. The bankruptcy court found that the Debtors
26 were not living at the Property at the time of the Hearing, and
27 because the Property had been rented, that it was investment
28 property. Finally, the bankruptcy court found that there was no

1 bad faith or manipulation on the part of the Debtors in moving
2 from the Property.

3 On December 21, 2010, the bankruptcy court entered its order
4 granting the Motion to Modify. On December 22, 2010, the
5 bankruptcy court entered its order confirming the Debtors' Plan.
6 BAC timely appealed both orders, asserting the bankruptcy court
7 erred in determining that BAC's claim was not secured by the
8 Debtors' principal residence and was subject to modification.

9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b). We have jurisdiction under 28 U.S.C. § 158.

12 **III. ISSUE**

13 What is the determinative date for whether a claim is
14 secured by a debtor's principal residence subject to the
15 Bankruptcy Code's anti-modification provision?

16 **IV. STANDARDS OF REVIEW**

17 We review the bankruptcy court's statutory construction of
18 § 1123(b) (5) de novo. Lee v. Home Sav. of Am. (In re Lee), 215
19 B.R. 22, 24 (9th Cir. BAP 1997), citing, In re Consol. Pioneer
20 Mortg., 178 B.R. 222, 225 (9th Cir. BAP 1995).

21 **V. DISCUSSION**

22 Resolving the question of when a claim is determined to be
23 secured by a debtor's principal residence for purposes of
24 § 1123(b) (5) begins "\where all such inquiries must begin: with
25 the language of the statute itself.'" Ransom v. FIA Card Servs.,
26 N.A. (In re Ransom), - U.S. -, 131 S. Ct. 716, 723-24 (2011)
27 quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235,
28 241 (1989). Section 1123, entitled "Contents of Plan," provides

1 that a chapter 11 plan of reorganization may:

2 modify the rights of holders of secured claims, other
3 than a claim secured only by a security interest in
4 real property that is the debtor's principal residence,
or of holders of unsecured claims, or leave unaffected
the rights of holders of any class of claims[.]

5 11 U.S.C. § 1123(b) (5).⁷ By its plain language, § 1123(b) (5)
6 allows debtors to modify the rights of creditors holding certain
7 claims - secured claims and unsecured claims, but sets out a rule
8 against modifying claims that are secured by a debtor's principal
9 residence.⁸

10 A "claim" is a defined term under the Bankruptcy Code. 11
11 U.S.C. § 101(5). Additionally, whether a claim is "secured" or
12 "unsecured" is a term of art defined by § 506. 11 U.S.C.
13 § 506(a) (1). When language is used in one section of a statute
14 and the same language is used in another section, we "can infer
15 that Congress intended the same meaning." Consol. Freightways
16 Corp. of Del. v. Aetna, Inc. (In re Consol. Freightways Corp. of
17 Del.), 564 F.3d 1161, 1165 (9th Cir. 2009) (internal citations

19
20 ⁷ The language of § 1123(b) (5) is identical to that of
21 § 1322(b) (2) and was added to the Bankruptcy Code in 1994 to
22 harmonize the treatment of home mortgage loans in chapter 11 and
23 chapter 13. See Granite Bank v. Cohen (In re Cohen), 267 B.R.
24 39, 42 (Bankr. D.N.H. 2001); Lomas Mortg., Inc. v. Louis, 82 F.3d
1, 6 (1st Cir. 1996) (citing legislative history). Therefore,
case law that examines § 1322(b) (2) is persuasive in our analysis
of § 1123(b) (5).

25 ⁸ BAC argues that "the term 'principal residence' is
26 ambiguous" leaving the courts to determine the meaning of the
27 term and intent of the statute. Appellant's Opening Br. at 7-10.
28 The Bankruptcy Code defines the "debtor's principal residence" as
a residential structure, including condominiums, co-ops, mobile
homes or trailers. 11 U.S.C. § 101(13A).

1 omitted); N. Sports, Inc. v. Knupfer (In re Wind N' Wave), 509
2 F.3d 938, 944 (9th Cir. 2007) ("identical words used in different
3 parts of the same act are intended to have the same meaning.").

4 A claim is a "right to payment, whether . . . secured, or
5 unsecured." 11 U.S.C. § 101(5). Claims are deemed allowed when
6 a creditor files a proof of claim and the amount of a claim is
7 determined as of the date of filing a bankruptcy petition. 11
8 U.S.C. § 502(a), (b); Heath v. Am. Express Travel Related Servs.
9 Co. (In re Heath), 331 B.R. 424, 426 (9th Cir. BAP 2005); Crain
10 v. PSB Lending Corp. (In re Crain), 243 B.R. 75, 83 (Bankr. C.D.
11 Cal. 1999). As of the petition date, the estate is created and
12 creditors'⁹ rights are fixed as much as possible.

13 Throughout a bankruptcy proceeding, however, the status of a
14 claim may change depending on the value of its interest. Thus:

15 An allowed claim of a creditor secured by a lien on
16 property in which the estate has an interest . . . is a
17 secured claim to the extent of the value of such
18 creditor's interest in the estate's interest in such
19 property . . . and is an unsecured claim to the extent
20 that the value of such creditor's interest . . . is
21 less than the amount of such allowed claim.

22 11 U.S.C. § 506(a).

23 Under these principles, a "claim secured by a debtor's
24 principal residence" may be a secured claim or an unsecured
25 claim. Nobelman v. Am. Sav. Bank, 508 U.S. 324, 331 (1993);
26 Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1223,
27 1226-27 (9th Cir. 2002). The Supreme Court found that valuation

28 ⁹ Creditors are fixed at the petition date. A "creditor" is
defined as an "entity that has a claim against the debtor that
arose at the time of or before the order for relief." 11 U.S.C.
§ 101(10) (A).

1 of collateral under § 506(a) determines the status of the
2 creditor's claim. Nobelman v. Am. Sav. Bank, 508 U.S. at 328-29.
3 If the claim is determined to be partially secured, the creditor
4 is still a "holder of a secured claim" whose rights are protected
5 from modification. Id. at 330-31. However, if a valuation of
6 the collateral leaves the creditor wholly unsecured, the claim
7 may be modified. In re Zimmer, 313 F.3d at 1226-27.

8 Therefore, in order for § 1123(b)(5) to protect a creditor
9 from modification of its claim, the bankruptcy court must first
10 determine whether the creditor holds a claim secured by a
11 debtor's principal residence. The second determination is
12 whether the value of the creditor's claim makes it secured or
13 wholly unsecured. See 11 U.S.C. § 506(a); In re Zimmer, 313 F.3d
14 at 1226; In re Cohen, 267 B.R. at 42.

15 Here, the bankruptcy court determined that BAC did not hold
16 a claim secured by the Debtors' principal residence because at
17 the time of the Hearing, the Debtors were no longer living at the
18 Property. The bankruptcy court set plan confirmation as the date
19 for determining whether § 1123(b)(5)'s anti-modification rule
20 applied to BAC's claim because "this whole process involves
21 valuing. And we know from the [Bankruptcy] [C]ode that you value
22 in connection with what you're doing, and we know that you value
23 a plan, creditor's rights, as of the effective date which then
24 refers to confirmation." Hr'g Tr. (October 28, 2010) at 4:18-23.

25 The bankruptcy court's reasoning is compelling. Indeed,
26 § 506(a) provides that:

27 [the value of a claim] shall be determined in light of
28 the purpose of the valuation and of the proposed
disposition or use of such property, and in conjunction

1 with any hearing on such disposition or use or on a
2 plan affecting such creditor's interest.

3 11 U.S.C. § 506(a). Although the amount of a creditor's claim is
4 fixed at the petition date, there is nothing to indicate that the
5 value of the claim must also be determined at the petition date.
6 Since modification of claims occurs only through debtors' plans,
7 it is at confirmation that the bankruptcy court considers whether
8 proposed modifications comply with requirements for confirmation.
9 Thus, it may be entirely appropriate to value a claim at the time
10 of plan confirmation. See e.g., In re Crain, 243 B.R. at 83-84
11 (valuation at confirmation); but see Dean v. LaPlaya Invs., Inc.
12 (In re Dean), 319 B.R. 474, 478-79 (Bankr. E.D. Va. 2004)
13 (valuation at petition date because debtor's use of principal
14 residence is to provide shelter; therefore, court does not need
15 to wait until confirmation to determine debtor's "use" of his
16 principal residence).

17 However, even though the bankruptcy court's rationale for
18 valuing BAC's claim at confirmation was reasonable, the
19 interpretation of § 1123(b) (5) as setting the determination of
20 whether a claim is protected from modification at the date of
21 confirmation is flawed. That approach improperly shifts the time
22 for fixing a creditor's claim from the petition date to some
23 future valuation date. It conflates the analysis of whether a
24 creditor holds a claim with a determination of the value of that
25 claim. The value of BAC' claim, whether it is secured or
26 unsecured, is a distinct issue from whether BAC's claim is
27 secured by the Debtors' principal residence.

28 The bankruptcy court concluded that confirmation was the

1 determinative date based on the phrase in the statute that reads
2 "real property that is the debtor's principal residence," which
3 uses the present tense and signaled to the bankruptcy court that
4 the subject of the sentence, "residence" must presently exist.
5 The Third Circuit, however, read such language differently,
6 finding that:

7 [b]y using the word 'is' in the phrase 'real property
8 that is the debtor's principal residence,' Congress
9 equated the terms 'real property' and 'principal
10 residence.' Put differently, this use of 'is' means
11 that the real property that secures the mortgage must
12 be only the debtor's principal residence in order for
13 the anti-modification provision to apply.

14 Scarborough v. Chase Manhattan Mortg. Corp. (In re Scarborough),
15 461 F.3d 406, 411 (3d Cir. 2006) (concluding that a claim secured
16 by real property that is, in part, not the debtor's principal
17 residence under the terms of the mortgage, may be modified.)

18 A narrow focus on sub-phrases, which modify antecedents
19 within the clause, is misplaced. Based on the grammatical
20 structure of the statute, the words "secured only by a security
21 interest in real property that is the debtor's principal
22 residence" modifies "claim" and describes the type of claim that
23 is excepted from modification. In re Cohen, 267 B.R. at 43; In
24 re Wetherbee, 164 B.R. 212, 215 (Bankr. D.N.H. 1994); see also,
25 Nobelman v. Am. Sav. Bank, 508 U.S. at 331 (it is reasonable "to
26 read 'a claim secured only by a [homestead lien]' as referring to
27 the lienholder's entire claim").

28 We similarly reject the narrow interpretation, made by some
bankruptcy courts, that the sub-phrase "real property that is the
debtor's principal residence" is intended to modify the term
"security interest." Based on that construction, those courts

1 conclude the phrase, "security interest in real property that is
2 the debtor's principal residence" is ambiguous (i.e., it could
3 refer to a home at the present time or when the security interest
4 was created) and rely on legislative history to resolve the
5 ambiguity. See e.g., In re Smart, 214 B.R. 63 (Bankr. D. Conn.
6 1997). Justice Stevens observed, in his concurrence in Nobelman,
7 that the purpose of the anti-modification clause was to provide
8 favorable treatment of home mortgages in order to encourage
9 capital into the home lending market. 508 U.S. at 332.
10 Therefore, in order to align with that purpose, those bankruptcy
11 courts concluded that the appropriate reference date for
12 determining if a property is a principal residence of the debtor
13 is the date that the security interest was created. In re Smart,
14 214 B.R. at 68; In re Benafel, 2010 WL 5373127 (Bankr. D. Or.
15 2010).

16 Reliance on legislative history is unnecessary when the
17 statute's language is unambiguous. Milavetz, Gallop & Milavetz,
18 P.A. v. United States, - U.S. - , 130 S. Ct. 1324, 1332 n.3
19 (2010). The plain language of § 1123(b)(5) excepts a particular
20 type of claim from modification. As discussed above, a
21 creditor's right to payment, whether it later is deemed secured
22 or unsecured depending on the value of the collateral, is fixed
23 at the petition date. 11 U.S.C. §§ 101(5), 502; In re Dean, 319
24 B.R. at 478. Therefore, our statutory analysis leads us to
25 conclude that the determinative date for whether a claim is
26 secured by a debtor's principal residence is, like all claims,
27 fixed at the petition date.

VI. CONCLUSION

Because the bankruptcy court did not determine the character of BAC's claim as of the petition date, we REVERSE the orders granting the Motion to Modify and confirming the Debtors' Plan.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28