No. 12-3336

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re Luigi Scotto DiClemente,
Debtor.

LUIGI SCOTTO DICLEMENTE,
Appellant

v.

AMBOY BANK, FKA AMBOY NAT'L BANK
Appellee

ON APPEAL FROM THE DISTRICT COURT FOR NEW JERSEY
No. 12-1266

NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS' BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEBTOR-APPELLANT

NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS
AMICUS CURIAE
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August 6, 2013

CORPORATE DISCLOSURE STATEMENT

DiClemente v. Amboy Bank, No. 12-3336

Pursuant to Rule 29(c)(1) of the Federal Rules of Appellate Procedure and Third Circuit Local Rule 26.1.1 *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

/s/ Tara Twomey
Tara Twomey

Dated: August 6, 2013

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STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of over 3,800 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Dehart v. Michael,* 699 F.3d 305 (3d. Cir. 2012).

NACBA and its membership have a vital interest in the outcome of this case. Many debtors seek chapter 13 protection in order to save their homes from foreclosure. To be eligible for chapter 13, debtors must have secured and unsecured debts below certain thresholds set forth in the Code. *See* 11 U.S.C. § 109(e). The value of debtors' homes in many instances is worth less than the amount of the existing mortgages. How these underwater mortgages are counted toward the debt limits is an open question of national significance.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did any party or party's counsel contribute money intended to fund this brief, and no person other than the National Association of Consumer Bankruptcy Attorneys contributed money to fund this brief.

SUMMARY OF ARGUMENT

The Bankruptcy Court and District Court erroneously equated the "claim" that the bank retained against Mr. Scotto-DiClemente's property with an unsecured "debt" for which Mr. Scotto-DiClemente, the Debtor, is personally liable. The Bankruptcy Code expressly defines the relationship between a "claim" on one hand and a "debt" on the other hand. A debt is defined as "liability on a claim." 11 U.S.C. § 101(12). In this case, the Debtor had no personal liability on the Bank's claim. Consequently, under the Bankruptcy Code, the Debtor had no unsecured "debt" related to the Bank's claim. For this simple reason, the District Court erred in affirming the Bankruptcy Court's determination that Mr. Scotto-DiClemente had too much unsecured "debt" to qualify as a chapter 13 debtor under 11 U.S.C. § 109(e).

ARGUMENT

Appellant Scotto-DiClemente owned a home in Keansburg, New Jersey, which served as his primary residence. Amboy Bank financed the house with a $180,000 mortgage in 2003. App. 4. In 2005, the Bank extended the Debtor an equity line of credit, also secured by his home, in the amount of $75,000. In 2008, a corporation through which the Debtor operated a restaurant obtained a business loan of more than $363,000 from the same Bank. The Debtor personally guaranteed this business loan, which was secured by a third mortgage on his home. In August 2009, all these loans went into default when the debtor was unable to make his monthly payments. App. 5.

In August 2010, Mr. Scotto-DiClemente filed a personal bankruptcy petition under Chapter 7; he was granted a discharge four months later. Under this discharge, his personal liabilities to the bank were entirely negated. That is, he had no further legal obligation to personally pay the Bank for the loans on his home. To the extent that the loans were secured by the value of his home, however, the Bank retained an *in rem* interest in the property. *See* 11 U.S.C. § 522(c)(2); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991).

Six months after receiving his Chapter 7 discharge the debtor filed under Chapter 13 for approval of a plan to reorganize his personal affairs. App. 6. (As the Bankruptcy Court noted, the use of Chapter 13 in this way, on the heels of a

Chapter 7 discharge, is sometimes referred to as a "Chapter 20" case. *In re Scotto-DiClemente*, 459 B.R. 558, 563, 564 n.4 (Bankr. D.N.J. 2011).) As part of this his debt adjustment plan, the Debtor proposed to cure the arrears he had owed to the bank under the first mortgage, and to strip off the second and third mortgages pursuant to 11 U.S.C. § 1322(b)(2); *see Scotto-DiClemente*, 459 B.R. at 561; *see also Nobelman v. American Savings Bank*, 508 U.S. 324 (1993); *In re McDonald (McDonald v. Master Financial, Inc.)*, 205 F.3d 606 (3d Cir. 2000) (explaining application of *Johnson* to undersecured mortgages, and to wholly unsecured mortgage loans, respectively). If allowed, this plan would have saved his home from foreclosure.

The Supreme Court's decision in *Johnson v. Home State Bank* also arose out of a scenario in which the debtor filed for personal debt adjustment under Chapter 13 soon after receiving a Chapter 7 discharge. The debtor in that case argued that the bank retained a "claim," that is, a claim against his property, after the chapter 7 discharge. The debtor proposed to pay off this claim through a Chapter 13 plan. This was so, the debtor argued, even though his debt to the bank had been discharged in the Chapter 7 bankruptcy, leaving the bank only with an *in rem* interest in the real estate pursuant to its security interest. In this way, the debtor could save his home from post-bankruptcy foreclosure. The

Supreme Court agreed, holding that the bank did have a "claim" within the meaning of Chapter 13, even after the debtor's Chapter 7 discharge.

In the present case, the District Court turned the Supreme Court's holding on its head, equating the "claim" that the bank retained (and which the debtor might then schedule and pay off with a plan under Chapter 13), to the extent it exceeded the value of the property, with an unsecured "debt," the term used in section 109(e). Classification of a portion of the bank's claim as an unsecured "debt" caused the Debtor to exceed the limits for Chapter 13 eligibility ($360,475 in unsecured debt at the time of the petition). *See* 11 U.S.C. § 109(e). Thus, the courts below held that the Debtor was precluded from invoking Chapter 13 at all; he was, according to the courts, ineligible to adjust his debts under Chapter 13. In this way, the reasoning that the Supreme Court unanimously embraced to allow discharged debtors to save their homes became the very argument used to justify foreclosure and eviction of the Debtor. This Court should reject that perverse result and reverse the judgment of the District Court.

The Bankruptcy Code expressly defines the relationship between a "claim" and a "debt." A "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured," and also includes any "right to equitable performance for breach of performance if

such breach gives rise to a right to payment ...." 11 U.S.C. § 101(5). Under this definition, the Supreme Court in *Johnson* determined that a mortgagee/lender retained a "claim" against an individual mortgagor/homeowner/borrower even after the mortgagor was discharged personally of the debt under Chapter 7, such that the "claim" could be provided for in a Chapter 13 plan under section 1322(a)(5). A "debt," on the other hand is defined as "liability on a claim." 11 U.S.C. § 101(12). *See generally Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990) (discussing relationship between Code's definitions of "claim" and "debt").

The fact that even after a Chapter 7 discharge the Bank had a "claim" against Scotto-DiClemente, as recognized in *Johnson*, does not mean that the he personally had any "*liability* on [that] claim" or "debt" as the Bankruptcy Court and District Court seemed to think. In fact, he did not, because his personal debt had been discharged, thus eliminating any "liability" he, as an individual, may once have had on that "claim." *Johnson*, 501 U.S. at 81, 82, 84 & n.5 (repeatedly noting and explaining that it is the debtor's "personal liability" for the loan which is discharged under Chapter 7); 11 U.S.C. § 524(a) (referring to that which is discharged as "the personal liability of the debtor with respect to any debt"); *see also* Webster's Third International Dictionary, Unabridged (Merriam-Webster, Inc. 2002) (defining "liable" as "bound or obligated according to law or equity").

Without a personal legal obligation to pay—that is, liability—there is no "debt" *of the discharged debtor* within the meaning of § 109(e) to stop him from invoking Chapter 13.

The situation was not that the discharge took away the Bank's security, leaving it with a claim that was "unsecured," insofar as it had been undersecured, as the District Court held. *See* App. 10. To the contrary, under the plain language of the Bankruptcy Code, because Mr. Scotto-DiClemente no longer had any personal legal obligation to pay that claim once the debt was discharged (though the Bank was still entitled to enforce its *in rem* rights), he personally had no "debt" – or at least no unsecured debt – to the bank. The courts below were thus mistaken in holding that the value of the bank's *claim* could push the debtor over the *debt* limit for availing himself of Chapter 13's protections. Under section 101(12), the two terms—"claim" and "debt"—are each other's reciprocals only to the extent that "liability" exists. Moreover, section 102(2) provides that the expression "claim against the debtor" includes a "claim against property of the debtor." In this way as well, the existence of a claim, as established by the holding in *Johnson*, does not *ipso facto* establish the existence of a "debt" of any sort against the Chapter 13 (post-Chapter 7) debtor personally as the District Court and Bankruptcy Court below (and the decisions on which those courts relied) appear to presume.

Because the language of the Code is clear on this point, no further analysis is required. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'"; construing Bankruptcy Code) (citation omitted); *see also Ransom v. FIA Card Services, Inc.*, 562 U.S. —, 131 S.Ct. 716, 723-24 (2011) (language of Bankruptcy Code is starting point; "ordinary meaning" determines significance of undefined words and phrases); *Davenport*, 495 U.S. at 557-58; *In re Oakwood Homes Corp.*, 449 F.3d 588, 595 (3d Cir. 2006) (same).

The Appellant-Debtor's other arguments against the holding of the lower courts in this case are also persuasive, and have in fact persuaded a number of other Bankruptcy Courts, whose decisions conflict with the ruling below. *See*, *e.g.*, *In re Scantling*, 465 B.R. 671 (Bankr. M.D. Fla. 2012) (thoughtful analysis of issue, recognizing split, reaching conclusion opposed to that of courts below). Simply because the Code treats the excess portion of an undersecured claim as an unsecured *claim*, *see* 11 U.S.C. § 506(a), it does follow that the debtor, after discharge, still has an unsecured *debt* to the creditor to that extent. To the contrary, the discharged debtor obviously no longer has such debt for purposes of the Bankruptcy Code, because s/he has no surviving *liability* to pay any such claim. *See Cavaliere v. Sapir*, 208 B.R. 784 (D. Conn. 1997) (debts discharged

in prior Chapter 7 proceeding do not count as either "secured" or "unsecured" debts for purposes of calculating Chapter 13 eligibility amounts under section 109(e); unsecured portion of undersecured claim against real estate, following grant of personal Chapter 7 discharge as to that debt, is not allowable unsecured claim in Chapter 13 case, pursuant to section 502(b)(1)).

The fact that a nonrecourse lien can be stripped off under Chapter 13, as the Debtor sought to do here with the second and third mortgages, does not convert those claims into unsecured debt, unless there is personal liability. Here, there is not. The property is liable for the debt, following the Chapter 7 discharge, to the extent it was secured, but the individual has no such liability and thus no "unsecured debt." As the Debtor's brief points out, a contrast with the language of Chapter 11—the bankruptcy reorganization option, analogous in many ways to Chapter 13, for corporations and for individuals with higher levels of debt—is s informative. Section 1111(b) provides that in most cases a nonrecourse claim secured by a lien against property is to be treated, when it is to be stripped in a Chapter 11 plan, as if there *were* personal recourse. There is no parallel provision in Chapter 13, and the courts therefore have no authority to create one, as occurred here by virtue of the decisions below. *In re Tolentino & Medina*, 2010 WL 1462772, *2 n.5, 2010 Bankr.LEXIS 1128 (Bankr. N.D. Cal., April 12, 2010) (invoking contrast between Chapter 11 and Chapter 13 in this context to

explain why debtor is not ineligible under § 109(e); *cf. In re Sweitzer*, 476 B.R. 468, 472 (Bankr. D. Md. 2012) (noting this contrast between Chapter 11 and Chapter 13, surveying recent authorities, and rejecting creditor's related argument that stripped claim should be treated as an "allowed unsecured claim").

For these reasons, the District Court erred in affirming the Bankruptcy Court. The debtor's Chapter 13 case should not have been dismissed.

CONCLUSION

For the reasons advanced in this brief and by the Appellant, amicus National Association of Consumer Bankruptcy Attorneys urges that this Court reverse the judgment of the U.S. District Court for the District of New Jersey and remand with directions to reinstate the debtor's Chapter 13 case, requiring consideration on its merits of the debtor's proposed plan to pay his first home mortgage and strip off the other liens on his home.[1]

Respectfully submitted,

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[1] Although on November 13, 2011, this Court declined to order a stay of the foreclosure sale pending appeal, the sale was subsequently conducted under the cloud of a *lis pendens*. *See* App. 17-18; AOB 11 n.3. Accordingly, the case is not moot.

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

_/s/Tara Twomey_____

CERTIFICATE OF COMPLIANCE

In accordance with FRAP Rule 29 this brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 2,322 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

_/s/Tara Twomey_____

CERTIFICATION UNDER LOCAL RULE 31.1(C)

I, Tara Twomey, hereby certify that (a) a virus check was performed on the pdf file of this brief using Symantec Endpoint Protection and that no virus was found.

_/s/Tara Twomey_____

STATUTORY ADDENDUM

11 U.S.C. § 101

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

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(12) The term "debt" means liability on a claim.

11 U.S.C. § 102

(2) "claim against the debtor" includes claim against property of the debtor;

11 U.S.C. § 109(e)*

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title.

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*The amounts in section 109(e) are adjusted every three years. At the time the Debtor filed his petition for relief under Chapter 13, the unsecured debt limit was $360,475.