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IN THE UNITED STATES BANKRUPTCY COURT U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA
FOR THE DISTRICT OF ARIZONA

In re:) Chapter 7
)
ROBERT W. NICHOLS and) Case No. 02-02215-TUC-EWH
7 MARY ANN NICHOLS,)
)
8 Debtors.) **MEMORANDUM DECISION**
9)
_____)

INTRODUCTION AND FACTS

11 Robert and Mary Ann Nichols (the “ Debtors”) seek to convert their case to a
12 Chapter 13 in an effort to dispose of a state court judgment entered in the summer of 2001 in
13 favor of Louise Whipple (“Whipple”) in the original amount of \$848,947.10 (“Whipple
14 Judgment”). The Whipple Judgment was determined to be non-dischargeable under 11 U.S.C.
15 § 523(a)(4) in the Debtors’ Chapter 7 case.¹ After the unfavorable dischargeability
16 determination, the Debtors returned to state court and successfully prosecuted a Rule 60
17 motion to amend the Whipple Judgment to strike the finding that the Debtors were jointly and
18 severally liable for the full amount of the judgment. On August 26, 2004, the state court
19 entered an amended judgement (“Amended Judgment”) against the Debtors in the principle
20 amount of \$174,485.17, with accrued interest at the rate of 10% through July 18, 2002 in the
21 amount of \$82,308.29. The Amended Judgment is currently on appeal, but no stay had been
22 entered pending the appeal.
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28 ¹ In a Chapter 13, § 523(a)(4) debts are dischargeable. See 11 U.S.C. § 1328(a)(2).

1 The Debtors' motion to convert is opposed by Whipple on the grounds that the Debtors
2 are ineligible for Chapter 13 because on May 9, 2002 when they filed for Chapter 7 relief (the
3 "Petition Date"), the amount of their unsecured debt exceeded the unsecured debt limit of
4 \$290,525.00. See 11 U.S.C. § 109(e). Whipple argues that her judgment, in excess of
5 \$800,000.00 by itself, disqualifies the Debtors for Chapter 13 relief. The Debtors argue that
6 because they listed the Whipple Judgment as disputed, it cannot be considered in their
7 Chapter 13 eligibility calculation. In the alternative, the Debtors argue that the amount of the
8 Amended Judgment should be the number used in calculating the Debtors' eligibility for
9 Chapter 13 relief. The Debtors also assert that interest stopped accruing on the Amended
10 Judgment after the Petition Date and, accordingly, they meet the §109(e) eligibility
11 requirements.
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15 As set forth in more detail in the balance of this decision, the Debtors are not eligible
16 for Chapter 13 relief because listing the Whipple Judgment as disputed does not remove it
17 from the Chapter 13 eligibility calculation. Even if the amount of Whipple's claim is the
18 amount of the Amended Judgment, the Debtors still exceed the eligibility limits of § 109(e)
19 because interest on the Amended Judgment continued to accrue after the Petition Date
20 because it is non-dischargeable in the Debtors' Chapter 7.
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22 JURISDICTIONAL STATEMENT

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24 Jurisdiction is proper in this case pursuant to 28 U.S.C. § 157(b)(2)(A).

25 ISSUE

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27 The sole issue is whether the Debtors are eligible for Chapter 13.

1 DISCUSSION

2 A. Disputed Debts are Included in Chapter 13 Eligibility Determination.

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4 Section 109(e) requires that a debt be non-contingent and liquidated to be counted
5 against the \$290,525.00 limit for unsecured claims. There is no requirement that a claim be
6 undisputed. A number of courts have found that disputing a claim does not make the claim
7 contingent and does not take the claim out of the eligibility calculation. See In re Mazzeo, 131
8 F.3d 295, 303-304 (2d. Cir. 1997); In re Nicholes, 184 B.R. 83, 90 (9th Cir. BAP 1995); In
9 re Slack, 187 F.3d 1070 (9th Cir. 1999).

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11 Generally a debt is non-contingent if no future event needs to occur for liability to
12 arise. In re Knight, 55 F.3d 231 (7th Cir. 1995). Pre bankruptcy judgments are generally
13 counted toward § 109(e) eligibility determinations and the fact that the debt is listed as
14 disputed is unlikely to defeat inclusion in the eligibility calculation. Lundin, Keith M., Chapter
15 13 Bankruptcy § 15.7 (3d ed. 2000). Since the Whipple Judgment was liquidated and non-
16 contingent on the Petition Date, it must be considered in the eligibility calculation.
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19 B. Even if the Amended Judgment is Used to Determine Eligibility the Debtors
20 Do Not Qualify for Chapter 13

21 Whipple argues that because the Whipple Judgment was the Judgment in effect on the
22 Petition Date, that its amount must be used in calculating the Debtors' eligibility for
23 Chapter 13. The Debtors argue that the amount of the Amended Judgment is what should be
24 used. Both sides rely on In re Scovis, 249 F.3d 975 (9th Cir. 2001) to support their arguments.
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1 In Scovis, the Ninth Circuit upheld the BAP's determination that a lien avoided by a
2 debtor after the filing of a Chapter 13 petition, rendered the judgment wholly unsecured for
3 eligibility purposes, notwithstanding the validity of the lien on the petition date. See In re
4 Scovis, 231 B.R. 336 (9th Cir. BAP 1999). However, the Ninth Circuit reversed the BAP's
5 determination that amended schedules which reduced the amount of unsecured debt should be
6 considered in determining Chapter 13 eligibility, holding that "ordinary events occurring
7 subsequent to the filing (e.g., paying down debt) do not affect the eligibility determination."
8 In re Scovis, 249 F.3d at 984. As Judge Lundin has observed "The rule in Scovis— that some
9 post-petition events will be considered in the eligibility calculus (for example, lien avoidance),
10 but not "ordinary" events—leaves much to be desired as guide for decision in the next case."
11 Lundin supra.

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15 In this case, the Debtors argue that obtaining Rule 60 relief from the state court was an
16 extraordinary event and, therefore, like the post-petition lien avoidance in Scovis, the Amended
17 Judgment, not the original Whipple Judgment, should be used to determine their eligibility for
18 Chapter 13. However, even if the state court's entry of the Amended Judgment is the type of
19 post-petition non-ordinary event which Scovis permits to be considered, it does not help the
20 Debtors because the non-dischargeable nature of the Whipple claim has resulted in continued
21 interest accrual on the amount of the Amended Judgment during the pendency of the Debtor's
22 Chapter 7 case. In re Boccio, 281 B.R. 171, 175 (Bankr. E.D. N.Y. 2002) citing In re Brace,
23 131 B.R. 612, 613-14 (Bankr. W.D. Mich. 1991) (holding that post-petition interest accrues
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1 on debt that is non-dischargeable for fraudulent misrepresentation); In re Foster, 319 F.3d 495
2 (9th Cir. 2002) (interest on nondischargeable debt continues to accrue).

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4 Even if somehow the Debtors could establish that they are entitled to treat their case
5 as converted as of the September 14, 2004 date that they filed their Motion to Convert their
6 case (and thereby stay the tolling of interest because § 523(a)(4) claims are dischargeable
7 under § 1328(a)(2)), the accrual of interest on the Amended Judgment would still exceed the
8 \$290,575.00 limit of § 109(e). Whipple calculates that the amount of the Amended Judgment
9 through October 22, 2004 exceeds \$313,000.00. The reduction of that amount by one month's
10 interest accrual would still not meet the § 109(e) limit.

11
12 **CONCLUSION**

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14 The Debtors are ineligible to be Chapter 13 debtors. A separate order denying the
15 Debtors' motion to convert their case will be entered this date.


16 Dated this 30th day of November, 2004.

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18 
19 EILEEN W. HOLLOWELL
20 UNITED STATES BANKRUPTCY JUDGE

21 Copy of the foregoing mailed this
22 30th day of November, 2004, to:

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