

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re  
Colleen Fry-Tafoya,  
Debtor.

No. 13-03-17144 SA

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON MOTION TO DISMISS BANKRUPTCY**

This matter is before the Court on Creditor Jorge Perez's Motion to Dismiss (doc. 29) and the objection thereto filed by the Debtor (doc. 34). Jorge Perez ("Perez") is represented by his attorney Rob Treinen (Feferman & Warren). Debtor is represented by her attorney Melody Williams. The matter is completely briefed and ready for decision. This is a core proceeding.

FINDINGS

1. Debtor filed her bankruptcy petition on September 10, 2003.
2. Debtor's unsecured debts listed on Schedule F total \$235,645.00. This amount includes Perez's judgment at \$150,000 and a debt to Ohio Casualty for a bond at \$1.
3. On July 3, 2003 the United States District Court entered an Order Confirming Arbitration Award in Perez v. Colleen Fry Tafoya; Kayjes, Inc. d/b/a Creative Living Manufactured Homes; and Conseco Finance Servicing Corp. The arbitration award awarded Perez \$75,000 in

compensatory damages against Debtor and Kayjes, jointly and severally; \$75,000 in punitive damages against Debtor and Kayjes, jointly and severally; \$225,000 in compensatory damages against Kayjes; \$5,000 for additional damages under the Unfair Practices Act against Kayjes; \$2,000 against Kayjes for violation of the Truth in Lending Act; and awarded 15% post judgment interest on the fraud judgment; and awarded attorneys fees. See Exhibit D to Brief in Support of Motion to Dismiss (doc. 30).

4. Ohio Casualty was required to pay \$75,000 to Perez pursuant to the judgment on behalf of Kayjes, Inc. under bonds it had issued. Debtor was liable to Ohio Casualty under the bonds.
5. Pursuant to the Order Clarifying Arbitration Award (Exhibit 1 to Notice of Order from Arbitrator Clarifying Arbitration Award, doc. 51) after payment of the bonds Debtor still owed Perez \$150,000 because the bond payments were applied to the debt of Kayjes to Perez.
6. Debtor's debt to Ohio Casualty was \$75,000 on the date of the petition.

CONCLUSIONS OF LAW

1. A Debtor may only have \$290,525 of noncontingent, liquidated, unsecured debts to be eligible for chapter 13.
2. Debtor's debt to Ohio Casualty was not contingent or unliquidated. The Bankruptcy Code does not define the terms "contingent" or "liquidated." Instead, those definitions come from the case law interpreting various sections of the Code.

"[A] contingent debt is 'one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor.'"

Fostvedt v. Dow (In re Fostvedt), 823 F.2d 305, 306 (9<sup>th</sup> Cir. 1987)(citing Brockenbrough v. Commissioner, 61 B.R. 685, 686 (W.D. Va. 1986)). A debt is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy.

Mazzeo v. United States (In re Mazzeo), 131 F.3d 295, 303 (2<sup>nd</sup> Cir. 1997). The fact that a debtor might have counterclaims, setoffs, affirmative defenses, or mitigating circumstances does not make a claim contingent because it "does not obviate the basic claim or negate the fundamental right to payment on the claim." In re

Clark, 91 B.R. 570, 575 (Bankr. D. Co. 1988). The debtors' liability to Ohio Casualty is not contingent; on the day she filed her petition all events that would have triggered Ohio Casualty's liability on the bonds, and therefore debtor's liability, had occurred.

A debt is "liquidated" if the amount of the debt is "readily determinable." Slack v. Wilshire Insurance Company (In re Slack), 187 F.3d 1070, 1073 (9<sup>th</sup> Cir. 1999). The United States Court of Appeals for the Ninth Circuit found that a debt is "readily determinable" if it requires only "a simple hearing to determine the amount of a certain debt" as opposed to an "extensive and contested evidentiary hearing in which substantial evidence may be necessary to establish amounts or liability." Id. at 1073-74. The United States Bankruptcy Appellate Panel of the Eight Circuit expressed a different perspective: "the key factor in distinguishing liquidated from unliquidated claims is not the extent of the dispute nor the amount of evidence required to establish the claim, but whether the process for determining the claim is fixed, certain, or otherwise determined by a specific standard." Barcal v. Laughlin (In re Barcal), 213 B.R. 1008, 1014 (8<sup>th</sup> Cir. B.A.P.

1997). Under Barcal, the calculation process may be time-consuming and difficult, but if the amount can be determined by reference to a specific standard it results in a liquidated claim. Gaertner v. McGarry (In re McGarry), 230 B.R. 272, 275-76 (Bankr. W.D. Pa. 1999)(citing Barcal, 213 B.R. at 1014). See also United States v. Verdunn, 89 F.3d 799, 802 (11<sup>th</sup> Cir. 1996)("A liquidated debt is that which has been made certain as to amount due by agreement of the parties or by operation of law... If the amount of the debt is dependent, however, upon a future exercise of discretion, not restricted by specific criteria, the claim is unliquidated." (Citations omitted.))

The concept of liquidation relates only to the amount of liability, not to the existence of the liability. Verdunn, 89 F.3d at 802 n.10. Thus, even if a debtor disputes the existence of liability, if the debt is calculable with certainty, the debt is liquidated. Slack, 187 F.3d at 1074-75. See also Matter of Knight, 55 F.3d at 235 (fact that debtor contested a claim, and denied it even existed, did not remove it as a claim under 109(e) or render it unliquidated) and Mazzeo, 131 F.3d at 305 ("The Code uses both 'unliquidated' and

'disputed' in its definition of 'claim'; to rule that a claim ... is unliquidated whenever it is disputed would be to render the term 'unliquidated' mere surplusage.") But see In re Lambert, 43 B.R. 913, 921 (Bankr. D. Ut. 1984)("If there arises a dispute as to the underlying liability of the debtor, then the entire debt is unliquidated until the liability is determined by a court of competent jurisdiction.")(minority view).

The Ohio Casualty claims in this case are contract claims<sup>1</sup>. Little more would be required to determine the amount due than examining the bond and the Perez judgment. The possible existence of an affirmative defense does not render a claim unliquidated<sup>2</sup>. Under the

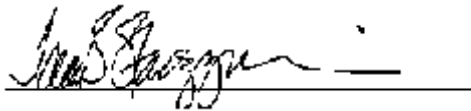
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<sup>1</sup>This fact alone would lead many courts to find that the claim was liquidated. See e.g., In re Pennypacker, 115 B.R. 504, 505 (Bankr. E.D. Pa. 1990)("The majority of courts that have considered this issue have held ... that debts of a contractual nature, even though disputed, are liquidated.")

<sup>2</sup>A majority of courts addressing the issue have found that if a debtor asserts an affirmative defense or counterclaim, the liquidated amount of the debt does not become unliquidated, nor is it reduced, on account of the defense or counterclaim. See Sylvester v. Dow Jones and Company, Inc., 19 B.R. 671, 673 (9<sup>th</sup> Cir. B.A.P. 1982); Matter of DeBrunner, 22 B.R. 36, 36-37 (Bankr. D. Nb. 1982); In re Troyer, 24 B.R. 727, 730 (Bankr. N.D. Oh. 1982); Craig Corp. v. Albano (In re Albano), 55 B.R. 363, 368 (N.D. Il. 1985); In re Burgat, 68 B.R. 408, 411 (Bankr. D. Co. 1986); In re Crescenzi, 69 B.R. 64, 65-66 (S.D.N.Y. 1986); In re Kaufman, 93 B.R. 319, 322 (Bankr. S.D.N.Y. 1988). Compare Quintana v. Internal Revenue Service (In re Quintana), 107 B.R. 234, 239-40 (9<sup>th</sup> Cir. B.A.P.

"simple hearing" inquiry of Slack, the "process" inquiry of Barcal, or the "specific criteria/lack of discretion" inquiry of Verdunn, the Court must find that the debts owed to Ohio Casualty in this case are liquidated.

3. The Debtor's debt to Perez should not be reduced by the \$75,000 debt owed to Ohio Casualty because Perez was still owed the full \$150,000.
4. Debtor had over \$310,000 of noncontingent, liquidated, unsecured debts and is ineligible for chapter 13.
5. In her objection to the Motion to Dismiss, Debtor requested that, as an alternate to dismissal if her debts were found to exceed the statutory limit that she be allowed to convert to chapter 11. The Court will allow time for Debtor to file a motion to convert.



Honorable James S. Starzynski  
United States Bankruptcy Judge

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1989) aff'd, 915 F.2d 513 (9<sup>th</sup> Cir. 1990)(Chapter 12 debtors' "aggregate debt" not reduced by value of counterclaim in computing eligibility for Chapter 12.)

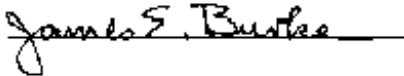


I hereby certify that on September 2, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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A handwritten signature in black ink, reading "James S. Burke", is written over a horizontal line.