

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: BETTY JEAN BACA,

No. 20-11549-j13

Debtor.

DAVID ORTEGA and
SANDRA ORTEGA,

Plaintiffs,

v.

Adversary No. 20-1063-j

BETTY JEAN BACA,

Defendant.

MEMORANDUM OPINION AND ORDER
GRANTING, IN PART, AND DENYING, IN PART, MOTION TO ENFORCE
SETTELEMENT AGREEMENT

Plaintiffs David and Sandra Ortega and Defendant Betty Jean Baca attended a voluntary mediation that resulted in a “Binding Settlement Agreement following Mediation” (the “Settlement Agreement”). Plaintiffs seek to enforce the Settlement Agreement¹ and request the Court to enter a nondischargeable judgment for the amount owed under the Settlement Agreement, plus reasonable attorney’s fees and costs associated with pursuing the Motion. In response,² Defendant asserts, among other things, that certain conditions in the Settlement Agreement have not been satisfied, that Defendant’s financial situation has since changed, and that the Settlement Agreement contains ambiguous terms. Defendant also objects to Plaintiffs’ request for attorney’s fees and costs. Having reviewed the Motion, Defendant’s Response, and the Settlement Agreement, the Court finds and concludes that the Settlement Agreement is

¹ See Motion to Enforce Settlement Agreement and for Entry of Judgment (“Motion”—[Doc. 11](#))

² See Defendant’s Response to Motion to Enforce Settlement Agreement and for Entry of Judgment (“Response”—[Doc. 13](#)).

enforceable, but that, consistent with the terms of the Settlement Agreement, Plaintiffs are not entitled to recover their attorney's fees and costs in bringing the Motion.

BACKGROUND AND PROCEDURAL HISTORY

Defendant filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code on July 31, 2020. Plaintiffs timely filed this adversary proceeding against Defendant seeking a determination that a particular debt Plaintiffs allege Defendant owes them (the "Debt") is nondischargeable under [11 U.S.C. §§ 523\(a\)\(2\), \(a\)\(4\), and \(a\)\(6\)](#). After Defendant answered the complaint, the parties agreed to attempt to resolve their dispute through mediation. With the consent of the parties, the Court entered a Mediation Order that ordered the parties to mediate, appointed a mediator, set forth mediation procedures, and set a mediation conference on February 25, 2021. [Doc. 5](#).

At a status conference held June 11, 2021, counsel for the parties advised the Court that although the parties executed a binding settlement following mediation, the parties had not reached an agreement as to the form of stipulated judgment contemplated by the Settlement Agreement, and that Plaintiffs intended to file a motion to enforce the Settlement Agreement while Defendant intended to file a motion to dismiss the adversary proceeding. *See* [Doc. 9](#).

Plaintiffs filed the Motion on June 16, 2021. Defendant filed a Motion to Dismiss this adversary proceeding on July 1, 2021, asserting that dismissal of Defendant's underlying bankruptcy case requires dismissal of this adversary proceeding. By separate order, the Court denied Defendant's Motion to Dismiss, concluding that Defendant's voluntary dismissal of her underlying chapter 13 bankruptcy case did not divest this Court of jurisdiction over this adversary proceeding or the Motion.

FACTS

The parties reached a settlement at the mediation. All parties and their counsel signed the Settlement Agreement.³ The Settlement Agreement, dated February 25, 2021, includes the following provisions:

- The Settlement Agreement fixes the amount of the Debt that Plaintiffs will pay Defendant at \$165,000.00 and provides for an initial payment of \$10,000 by May 26, 2021 and monthly installments of \$750.00 due on the 21st of each month beginning in June 2021. Settlement Agreement, ¶¶ 1-2. There is a 15-day grace period prior to a late payment constituting a default. *Id.* at ¶ 2.
- Defendant will dismiss her chapter 13 bankruptcy case. *Id.* at ¶ 8.
- In the event of a default, Plaintiffs are entitled to a judgment against Defendant in the amount of \$361,000, net of payments made prior to default, as a nondischargeable debt in any bankruptcy proceeding. *Id.* at ¶¶ 5 and 6. Plaintiffs “shall send a written notice of a default to [Defendant].” *Id.* at ¶ 5.
- The Settlement Agreement is entitled “Binding Settlement Agreement Following Mediation.” The Settlement Agreement recites the “essential terms of the parties’ binding and enforceable settlement agreement” *Id.* at Unnumbered Opening Paragraph.
- The parties will draft a definitive settlement agreement and other documents as “reasonably required to implement” the Settlement Agreement. *Id.* at ¶ 10.
- The Settlement Agreement “shall be binding upon execution, subject only to bankruptcy court approval[,]” and that “[i]n the event of a dispute about the meaning” of the Settlement Agreement, the parties’ intent, or “the form or substance of any document executed in accordance with” the Settlement Agreement, the mediator will serve as arbitrator, “whose decision shall be final and nonappealable.” *Id.* at ¶ 12.
- “Each party will pay its own attorney fees.” *Id.* at ¶ 9.

Pursuant to the terms of the Settlement Agreement, Defendant voluntarily dismissed her chapter 13 case in March of 2021.

³ A copy of the fully executed Settlement Agreement is attached to the Motion.

DISCUSSION

To decide the Motion the Court must first decide whether the dispute between the parties regarding the Settlement Agreement should be decided by binding arbitration. If arbitration is not required, the Court will consider whether to enforce the Settlement Agreement.

The dispute need not be submitted to binding arbitration

The Settlement Agreement provides:

In the event of a dispute about the meaning of this agreement, the intent of the parties, and/or the form or substance of any document executed in accordance with this agreement, the matter shall be submitted to Tara Kaminski [the mediator] for binding arbitration, whose decision shall be final and nonappealable. Settlement Agreement, ¶ 12

Thus, if the Motion requires a determination of the meaning of the Settlement Agreement or the intent of the parties, or a dispute regarding the form of any additional documents to be prepared and executed as a result of the Settlement Agreement, the Court must refer the matter to the mediator for arbitration. The mediator will serve as the arbitrator. If the question of enforcement can be resolved based solely on the undisputed terms of the Settlement Agreement, referral to the mediator for arbitration is unnecessary.

The only argument Defendant raises that implicates the meaning of a term in the Settlement Agreement relates to the requirement for written notice of default. Defendant asserts that the Settlement Agreement contains an ambiguity inasmuch as it fails to provide a cure period, rendering the requirement for written notice of default absurd if there is no opportunity to cure. This Court disagrees that the failure to provide for a cure period renders the requirement for notice of default ambiguous or absurd.

First, requiring a written notice of default without affording the defaulting party a cure period is not absurd. Requiring written notice of default provides notice to the defaulting party that the non-defaulting party has decided to declare a default and has not waived the default. It is

possible that the non-defaulting party may choose to waive a default instead of giving written notice of default. Upon receipt of the written notice of default, the defaulting party can still contest whether a default has occurred.

Second, the Settlement Agreement provides for a 15-day grace period instead of a right to cure a default. *See* Settlement Agreement, ¶ 2 (“Payments not received by [Plaintiff] David Ortega within fifteen days of the due date will be considered late, and late payments constitute a default under this agreement.”).

The fact that the Settlement Agreement requires written notice of default without a subsequent cure period does not render the Settlement Agreement ambiguous or prevent its enforcement. Consequently, because there is no genuine dispute about the meaning of the Settlement Agreement or the intent of the parties, it is unnecessary to refer this matter to the mediator for arbitration.

The Court will enforce the Settlement Agreement.

Having determined that the Motion need not be referred to the mediator for arbitration, the Court will next consider whether to enforce the Settlement Agreement. The Court construes the Settlement Agreement in accordance with applicable state law. *Shoels v. Klebold*, [375 F.3d 1054, 1060](#) (10th Cir. 2004) (“Issues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law.”) (citation omitted). Because the parties executed the Settlement Agreement in New Mexico in connection with a bankruptcy case filed in the District of New Mexico, the Court will apply New Mexico law.

“It is the policy of the law and of the state of New Mexico to favor settlement agreements.” *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*, 1988-NMSC-010, ¶ 3, [106 N.M. 705, 707, 749 P.2d 90, 92](#) (citations omitted); *Builders Contract Interiors, Inc. v. Hi-*

Lo Indus., Inc., 2006-NMCA-053, ¶ 7, [139 N.M. 508, 511, 134 P.3d 795, 798](#) (acknowledging New Mexico’s strong policy favoring settlements). Defendant does not contest that she entered into the Settlement Agreement. The Court thus begins with the proposition that the Settlement Agreement should be enforced according to its terms unless there is a compelling basis to set the Settlement Agreement aside. *See Montano v. N.M. Real Est. Appraiser’s Bd.*, 2009-NMCA-009, ¶ 12, [145 N.M. 494, 497, 200 P.3d 544, 547](#) (“Because of their favored status, there must be a compelling basis to set aside a settlement agreement.” (quoting *Cortez v. Cortez*, 2007-NMCA-154, ¶ 14, [143 N.M. 66, 172 P.3d 615, rev'd on other grounds, by 2009-NMSC-008, 145 N.M. 642, 203 P.3d 857](#))).

The Court will address each of Defendant’s arguments in defense of enforcement of the Settlement Agreement in turn.

1. *Failure to Give Sufficient Written Notice of Default or to Specify the Nature of the Default*

Defendant contends that Plaintiffs a) have not complied with the Settlement Agreement’s requirement to give written notice of default, and b) even if the Motion itself⁴ constitutes written notice, Plaintiffs’ notice is insufficient because it does not specify the nature of the default. Neither of these alleged deficiencies is sufficient to prevent enforcement of the Settlement Agreement.

The Settlement Agreement was executed February 25, 2021. Thereafter, Defendant failed to make the initial \$10,000 payment under the Settlement Agreement due on May 26, 2021 by the due date or within the 15-day grace period that ended on June 10, 2021. At a status conference held on June 11, 2021, Defendant’s counsel represented to the Court that Defendant

⁴ The Motion contains the following statement: “**This motion constitutes written notice of Defendant’s default.**” Motion, ¶ 8.

decided she no longer could afford the Settlement Agreement. Plaintiffs' Motion, filed June 16, 2021, alleges that Defendant has "completely failed to perform under the Settlement Agreement, and [that] Defendant's counsel stated at the previous status conference . . . that Defendant has willfully decided not to perform under the Settlement Agreement." It is clear that the nature of the default is the Defendant's failure to make the initial payment of \$10,000 due on May 26, 2021.

Under these circumstances, where Defendant's counsel represented to Plaintiffs that Defendant no longer intends to perform her obligations under the Settlement Agreement and now asserts that the Settlement Agreement is unenforceable, Plaintiffs' failure to provide Defendant with separate written notice of default prior to filing the Motion is excusable. *Cf. First Nat'l Bank of Omaha v. Three Dimension Sys. Products, Inc.*, [289 F.3d 542, 545](#) (8th Cir. 2002) (applying Arizona law and upholding jury instruction which provided that that an anticipatory breach by one party relieved the non-defaulting party from the requirement to give notice of default with an opportunity to cure). Requiring Plaintiffs to begin anew and provide Defendant with written notice of default before filing another motion seeking to enforce the Settlement Agreement based on Defendant's default in nonpayment serves no substantive purpose and would cause the parties to incur additional attorney fees.

2. *Failure to Complete Definitive Settlement Documents as Contemplated by the Settlement Agreement*

Defendant suggests that the failure to complete the definitive settlement documents is a bar to enforcement of the Settlement Agreement. This Court disagrees. The Settlement Agreement became binding upon execution.⁵ Under New Mexico law, "a party can be

⁵ Although the Settlement Agreement also provides that it is subject to bankruptcy court approval, Defendant did not assert that such condition renders the Settlement Agreement unenforceable; consequently, Defendant has forfeited that argument. *Sprint Nextel Corp. v. Middle Man, Inc.*, [822 F.3d](#)

considered bound by a settlement even if certain details are not worked out, if such details are not essential to the proposal or cause a change in the terms or purpose to be accomplished by the settlement.” *Jones v. United Mins. Corp.*, 1979-NMSC-103, ¶ 13, [93 N.M. 706, 708, 604 P.2d 1240, 1242](#) (citing *Bogle v. Potter*, 1963-NMSC-076, [72 N.M. 99, 380 P.2d 839](#)). The Settlement Agreement contained the essential terms of the parties’ agreement: Defendant agreed to pay Plaintiffs \$165,000 in settlement of Plaintiffs’ non-dischargeability suit on specified terms and Defendant agreed to dismiss her pending chapter 13 bankruptcy case. In the event of a default, Plaintiffs are entitled to a nondischargeable judgment against Defendant in the amount of \$361,000, net of payment made prior to default. The alleged default is Defendant’s failure to perform one those essential terms, the payment terms, expressly stated in the executed the Settlement Agreement. Thus, the failure to complete any additional settlement documents is not a bar to enforcement.

3. *Defendant’s Changed Financial Circumstances During the Delay in Plaintiffs Providing Draft Settlement Documents*

Defendant states that her financial situation changed during the nearly three-month delay in receiving from Plaintiffs the additional settlement documents contemplated by the Settlement

524, 531 (10th Cir. 2016) (“Forfeiture is failure to timely assert a right”); *United States v. Elliott*, [684 Fed. App’x 685, 687](#) (10th Cir. 2017) (arguments not timely and adequately presented to the trial court are forfeited). In any event, bankruptcy court approval of the Settlement Agreement is unnecessary. Bankruptcy Rule 9019, which governs compromises and settlements, provides for court approval of a compromise or settlement on motion by the trustee (or debtor-in-possession). Its purpose “is to bind the bankruptcy estate to the terms of any bargain struck by a trustee or debtor-in-possession that affects the bankruptcy estate.” *In re OptinRealBig.com, LLC*, [345 B.R. 277, 291](#) (Bankr. D. Colo. 2006) (citation omitted). However, “it is clear that Rule 9019 does not apply to compromises not involving the estate.” *In re Hall*, No. 06-40872, 2010 WL 1730684, at *8 (Bankr. D. Kan. Apr. 28, 2010). Here, the Defendant’s bankruptcy case was dismissed as part of the settlement. Upon dismissal, there is no longer a bankruptcy estate that the Settlement Agreement might affect. Consequently, court approval of the Settlement Agreement was not required. See *Hyundai Motor Fin. Co. v. McKay (In re McKay)*, [443 B.R. 511, 523](#) (Bankr. E.D. Ark. 2010) (“Rule 9019(a) . . . does not require parties other than a trustee or debtor-in-possession to obtain court approval of settlements that do not affect the debtor’s [bankruptcy] estate, such as agreements regarding whether a particular debt is excepted from discharge.”).

Agreement, and that she no longer can afford to pay the settlement amount. It appears from this argument that Defendant contends Plaintiffs' delay somehow excuses Defendant's performance or renders the Settlement Agreement unenforceable. Again, this Court disagrees. Plaintiffs' delay in providing the additional documents to Defendant's counsel does not constitute a material breach of the Settlement Agreement that would relieve Defendant from her payment obligations under the Settlement Agreement, and Defendant's changed financial circumstances alone are insufficient to render the Settlement Agreement unenforceable.

A material breach will excuse the non-breaching party from further performance under a contract, *Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-155, ¶ 14, [126 N.M. 69, 73, 966 P.2d 777, 781](#), and a settlement agreement is a form of contract. *Builders Contract*, 2006-NMCA-053 at ¶ 8, [139 N.M. at 511, 134 P.3d at 798](#) (“[A] settlement agreement is a species of contract . . .”). A breach is material if the failure to perform “is so fundamental to the contract that . . . [it] defeats an essential purpose of the contract.” *Famiglietta*, 1998-NMCA-155 at ¶ 17, [126 N.M. at 74, 966 P.2d at 782](#) (quoting *Horton v. Horton*, [254 Va. 111, 115, 478 S.E.2d 200, 204](#) (1997)). Plaintiffs' delay in preparing the definitive settlement documents as contemplated by the Settlement Agreement, that was binding upon execution, does not constitute a material breach that would excuse Defendant's performance because the preparation of definitive settlement documents does not defeat an essential purpose of the parties' agreement to settle the non-dischargeability claim for an agreed upon amount.

Neither is Defendant's present inability to pay, by itself, a valid excuse for nonperformance. Defendant was represented by counsel at the time of the Settlement Agreement and voluntarily agreed to make the payments to settle Plaintiffs' non-dischargeability action. “Unless there is ‘an affirmative showing of mistake, fraud, or illegality,’ ‘the fact that some of

the terms of [an] agreement resulted in a hard bargain or subjected a party to exposure of substantial risk, does not render a contract unconscionable[,]” and, therefore, unenforceable.⁶ *Builders Contract*, 2006-NMCA-053 at ¶ 7, [139 N.M. at 511](#), [134 P.3d at 798](#) (quoting *Smith v. Price’s Creameries*, 1982-NMSC-102, ¶ 14, [98 N.M. 541, 545](#), [650 P.2d 825, 829](#)). See also *Montano*, 2009-NMCA-009, at ¶ 12, [145 N.M. at 497](#), [200 P.3d at 547](#) (“We will allow equity to interfere with enforcing clear contractual obligations ‘only when well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality justify deviation from the parties’ contract.”) (quoting *Builders Contract*, 2006-NMCA-053, at ¶ 7, [139 N.M. at 511](#), [134 P.3d at 798](#))).

In defense of the Motion Defendant has not alleged mistake or illegality; unconscionability, fraud, or any other grossly inequitable conduct by Plaintiffs; or any other grounds that might excuse performance or render a contract unenforceable. The Court must, therefore, enforce the Settlement Agreement as written despite Defendant’s alleged changed financial circumstances since signing the Settlement Agreement. See *Winrock Inn Co. v. Prudential Ins. Co. of Am.*, 1996-NMCA-113, ¶ 36, [122 N.M. 562, 570](#), [928 P.2d 947, 955](#) (“In the absence of fraud, unconscionability, or other grossly inequitable conduct, New Mexico courts do not have discretion . . . to interfere with contractual rights and remedies which go to the heart of the bargain.”).

4. *Lack of Jurisdiction Following Dismissal of the Underlying Bankruptcy Case*

Defendant maintains that the voluntary dismissal of her underlying chapter 13 bankruptcy case moots this adversary proceeding, since she no longer seeks a discharge in her dismissed chapter 13 case. By separate order, the Court denied Defendant’s Motion to Dismiss, concluding

⁶ Nor did Defendant assert other grounds in defense of the Motion that might excuse performance or render a contract unenforceable, such as the doctrines of impossibility and frustration of purpose.

that this Court retains jurisdiction over this adversary proceeding and the Motion to enforce the Settlement Agreement notwithstanding dismissal of Defendant's underlying bankruptcy case.

See [Doc. 15](#).

Dismissal of Defendant's bankruptcy case did not moot this adversary proceeding or the agreed non-dischargeability determination. Once Plaintiffs and Defendant agreed per the Settlement Agreement that the Debt at issue is nondischargeable, such non-dischargeability determination will remain effective for any future bankruptcy case. "[A] debtor may consent to settle bankruptcy non-dischargeability litigation by agreeing that the debt is not dischargeable, and such agreement will be enforced in a subsequent bankruptcy case as well, just the same as if the court in the first bankruptcy case had made a determination of non-dischargeability."

Crossroads Bank v. Charles (In re Charles), No. 14-10718-TPA, 2015 WL 4100362, at *5 (Bankr. W.D. Pa. July 6, 2015) (citing *Saler v. Saler (In re Saler)*, [205 B.R. 737, 748-49](#) (Bankr. E.D. Pa. 1997), *aff'd*, [217 B.R. 166](#) (E.D. Pa. 1998)). See also *In re Garcia*, [313 B.R. 307, 310](#) (9th Cir. BAP 2004) ("In general, a determination of nondischargeability in one bankruptcy case bars redetermination of that issue in a subsequent bankruptcy case."); *Farmers & Merchants State Bank v. Siebert (In re Siebert)*, [302 B.R. 265](#) (Bankr. N.D. Ohio 2003) (consent judgment of non-dischargeability entered in prior bankruptcy case was entitled to claim preclusive effect to bar discharge of same debt in subsequent bankruptcy case).

5. *No Entitlement to Recover Attorneys' Fees.*

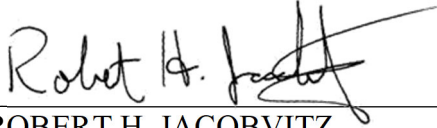
Defendant correctly points out that the Settlement Agreement does not contain a fee-shifting provision that would entitle Plaintiffs to recover attorneys' fees incurred in filing the Motion. To the contrary, the Settlement Agreement expressly provides that "[e]ach party will

bear its own attorney fees.” Settlement Agreement, ¶ 9. Thus, in enforcing the Settlement Agreement, Plaintiffs’ request for attorneys’ fees must be denied.

CONCLUSION

Based on the foregoing, the Court concludes that the Settlement Agreement is enforceable as written and need not be referred to the mediator for arbitration as to the meaning of its terms or the parties’ intent. Defendant raises no arguments that would excuse her from performance of her obligations under the Settlement Agreement.

WHEREFORE, IT IS HEREBY ORDERED that the Motion is GRANTED to the following extent. Plaintiffs are entitled to enforce the binding Settlement Agreement executed by the parties following mediation even though a contemplated definitive settlement agreement has not been executed and Defendant’s financial circumstances allegedly have changed. The Court otherwise denies the Motion. Plaintiffs are not entitled to an award of attorney’s fees. The Court will enter a separate judgment of non-dischargeability in favor of Plaintiffs and against Defendant in the amount of \$361,000 in accordance with the Settlement Agreement.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: November 3, 2021

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