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ORDERED in the Southern District of Florida on June 26, 2012.

A handwritten signature in black ink, appearing to read "Erik P. Kimball".

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

CASE NO.: 10-30306-EPK

MICHAEL PAUL PANELLA
and CLAIRE PANELLA,

CHAPTER 7

Debtors.

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ORDER DENYING ANDREW PERL'S MOTION FOR REHEARING

THIS MATTER came before the Court upon the *Motion for Rehearing on Order on Notice of Objection to Rejection Agreement of Cooperation and Joint Petition to Government Agencies Dated September 28, 1992 and Right of First Refusal Dated March 16, 2007 [D.E. No. 126] with Incorporated Memorandum of Law [ECF No. 128]* (the "Motion") filed by creditor Andrew Perl ("Mr. Perl"). In the Motion, Mr. Perl asks this Court to reconsider an order [ECF No. 126] (the "Order") in which the Court ruled, among other things, that Mr. Perl's rights following rejection of a Right of First Refusal (the "Right of First Refusal") between Claire and Michael Panella (together, the "Debtors") and Mr. Perl constituted a

claim dischargeable in the Debtors' chapter 7 case. Mr. Perl asks the Court to determine that he is entitled to specific performance of the Right of First Refusal and that such equitable right is not a claim subject to discharge in this case. For the reasons stated below, the Court confirms its original ruling that rejection of the Right of First Refusal did not result in Mr. Perl obtaining any right other than a claim subject to discharge in this case, and so the Motion is denied.

Fed. R. Civ. P. 59, made applicable in this case by Fed. R. Bankr. P. 9023, provides that a court may grant a motion to alter or amend an order or judgment if the movant presents: (1) newly discovered evidence that was not available at the time of trial, or (2) evidence in the record that clearly establishes manifest error of law or fact. *Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116, 1119 (11th Cir. 1999) (citing *In re Investors Fla. Aggressive Growth Fund, Ltd.*, 168 B.R. 760, 768 (Bankr. N.D. Fla. 1994)). Mr. Perl argues that the Court erred in determining that rejection of the Right of First Refusal accorded Mr. Perl only a claim dischargeable in this case. Mr. Perl asserts that the real property that is the subject of the Right of First Refusal is unique not just because it is real property but because it is located adjacent to Mr. Perl's property. Mr. Perl argues that under Florida law he would thus be entitled to specific performance of the Right of First Refusal and that such remedy is not a claim subject to discharge in this case.

As the Court ruled in the Order, the Right of First Refusal is an executory contract covered by section¹ 365. See *In re Kellstrom Indus.*, 286 B.R. 833, 834-35 (Bankr. D. Del. 2002) (listing cases). In this chapter 7 case, because the trustee did not assume the Right of First Refusal within 60 days after commencement of this case, the Right of First Refusal was deemed rejected under section 365(d)(1). Such rejection constitutes a breach of the

¹ Unless otherwise indicated, the term "section" used in this Order refers to a section of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

Right of First Refusal immediately before the date of the filing of the petition pursuant to section 365(g)(1).

The question before the Court was -- what right did Mr. Perl obtain as a result of such pre-petition breach? If Mr. Perl obtained a claim within the meaning of section 101(5),² such claim was discharged in this chapter 7 case under section 727(b). If Mr. Perl held a property right as a result of the Right of First Refusal such property right would not be affected by the discharge. Likewise, if Mr. Perl obtained as a result of rejection a right to an equitable remedy for breach of performance that did not give rise to a right to payment, then such right was not a claim subject to discharge under section 727(b) and Mr. Perl still holds such right.

The Florida Supreme Court has ruled that a right of first refusal is a contractual obligation between the parties and does not give rise to a property right. *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Assoc. One, Inc.*, 986 So. 2d 1279, 1287 (Fla. 2008). Thus, Mr. Perl did not obtain any property right under the Right of First Refusal that might survive rejection of the agreement.

The only remaining question is whether Mr. Perl's alleged right to specific performance is a claim under section 101(5). In *In re Rabin*, Judge Robert A. Mark of this Court considered the same issue in the context of a pre-petition agreement for purchase of Florida real property. 361 B.R. 282 (Bankr. S.D. Fla. 2007). In *Rabin*, after reviewing the relevant provisions of the Bankruptcy Code, applicable precedent and the legislative history for section 101(5)(B), the court concluded that "an equitable remedy will 'give rise to a right

² Section 101(5) defines a claim as "(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."

to payment' and therefore be a 'claim' under § 101(5)(B) if the payment of monetary damages is an alternative to the equitable remedy." *Id.* at 285. Then, the court determined that under Florida law breach of a contract for sale of real property would entitle the aggrieved purchaser to seek either damages or specific performance. *Id.* Because the breach would give rise to a right to payment under Florida law, the court ruled that the purchaser under the agreement held a claim subject to discharge. *Id.* The analysis in *Rabin* is equally applicable to the Right of First Refusal at issue here. Because breach of the Right of First Refusal would entitle Mr. Perl to a claim for damages under Florida law, Mr. Perl holds a claim as defined in section 101(5)(B) and such claim was discharged in the above-captioned chapter 7 case.

For the foregoing reasons, the Court **ORDERS AND ADJUDGES** that the Motion for Reconsideration [ECF No. 128] is DENIED.

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Copies Furnished To:

Andrew Fulton IV, Esq

Andrew Fulton IV, Esq is directed to serve a copy of this Order on all appropriate parties and file a certificate of service with the Court.