Florida Bankruptcy Case Law Update

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Kathleen L. DiSanto and Erik Johanson
Editors: Bradley M. Saxton and C. Andrew Roy

Eleventh Circuit Opinions

Zucker v. FDIC (In re BankUnited Fin. Corp.),

--- F.3d ----, 2013 WL 4106387 (11th Cir. Aug. 15, 2013).

- Section/Rule/Keywords: 11 U.S.C. § 541, property of the estate, debtor-creditor relationship, tax refunds

- Summary: Holding company and subsidiary bank entered into Tax Sharing Agreement ("TSA"), in which the holding company agreed to file the group's income tax return and the subsidiary bank agreed to pay all the taxes due from the entire banking group. After the return was filed and the taxes paid, the other members of the group promised to reimburse the subsidiary bank for their share of the taxes that were paid, and the subsidiary bank promised to reimburse the other members of the group any tax refund they were entitled to receive. After the subsidiary bank was placed into receivership and the holding company filed for bankruptcy, the holding company received several million dollars in tax refunds, which it claimed were property of the estate. The FDIC, standing in the shoes of the subsidiary bank, filed a claim in the holding company's bankruptcy case asserting that it was entitled to be reimbursed in accordance with the TSA. The bankruptcy court held that the refunds were assets of the bankruptcy estate, and the parties requested an appeal to the Eleventh Circuit, which reversed. Specifically, the Eleventh Circuit noted that the holding company and subsidiary bank did not have a debtor-creditor relationship, and instead that the holding company received the refunds in escrow for the benefit of the subsidiary bank and other members of the banking group. Thus, the Eleventh Circuit held the refunds occupied the same status in the holding company's hands as they did in the subsidiary bank's hands and were not property of the estate.

Torrens v. Hood (In re Hood),

--- F.3d ----, 2013 WL 4574249 (11th Cir. Aug. 29, 2013).

- Section/Rule/Keywords: 11 U.S.C. §§ 527 and 528, Florida Rules of Professional Conduct 4-3.3 and 4-8.4, 18 U.S.C. § 157, ghostwriting, false or fraudulent representations to the court

- Summary: A prospective client approached a law firm to discuss foreclosure defense and bankruptcy protection, and hired the firm to provide foreclosure defense services in exchange for a $1,000 retainer. Notwithstanding, the firm also filled out and filed a pro se chapter 13 petition on behalf of the client, but did not indicate that the petition had been prepared with the assistance of counsel. The client later alleged that he did not intend to file bankruptcy, and the bankruptcy court found that the law firm had acted as ghostwriters by failing to sign the petition and thus perpetrated fraud on the court. The law firm appealed, and the district court affirmed. The law firm appealed again, and the Eleventh Circuit reversed. Specifically, the Eleventh Circuit noted that the firm had not actually "drafted" the chapter 13 petition within the meaning of that term as provided in the Florida Rules of Professional Conduct. Accordingly, because the chapter 13 petition was a simple document that was designed for use by and among pro se individuals, the law firm's failure to sign the petition or to indicate that it had been prepared with the assistance of counsel was unlikely to cause any confusion or prejudice. Therefore, the Eleventh Circuit held that the bankruptcy court abused its discretion by concluding that the law firm committed fraud and imposing sanctions on the attorneys involved.

In re Sears,

--- Fed. Appx. ----, 2013 WL 4426516 (11th Cir. Aug. 20, 2013)

- Section/Rule/Keywords: 11 U.S.C. § 523; non-dischargeability

- Summary: Bankruptcy court entered judgment for government holding that debts owed by debtor in conjunction with a surety bond on which the debtor defaulted were non-dischargeable on account of the debtor's false statements in conjunction with the procurement of the bond. The district court affirmed, and the Eleventh Circuit affirmed, noting that the government suffered a loss on account of the bond the debtor defaulted on and the commission the debtor obtained in exchange for issuing the surety bond constituted money fraudulently obtained by the debtor. Notwithstanding, the Eleventh Circuit noted that other bonds the

debtor had issued, and which contained fraudulent misstatements, could not form the basis for a non-dischargeability determination where the debtor did not default on those obligations.

Stevenson v. Uttermohlen (In re Uttermohlen),

--- Fed. Appx. ----, 2013 WL 4033911 (11th Cir. Aug. 9, 2013)

- Section/Rule/Keywords: 11 U.S.C. § 522, discharge, exemptions, tenancy-by-the-entireties property

- Summary: Bankruptcy court determined that debtor's tax refund was exempt as tenancy-by-the-entireties property under section 522(b)(3)(B). The trustee argued that the tax refund was not tenancy-by-the-entireties property and should be apportioned according to each spouse's income contribution. The bankruptcy court found that the unities to own property as tenants-by-the-entireties were present and that the tax refund was exempt property. The district court affirmed, and the Eleventh Circuit affirmed, per curium.

District Court Opinions

Carpenter v. Brown,

2013 WL 4047017 (S.D. Fla. Aug. 9, 2013) (Moore, J.).

- Section/Rule/Keywords: 11 U.S.C. § 522, homestead, Fla. Const. Art. X § 4(a), Fla. Stat. §§ 222.01 and 222.02

- Summary: A homeowner entered into a contract to sell his homestead property and subsequently filed a chapter 7 petition. Eight days after filing his petition, the homeowner closed on the sale contract. The homeowner did not intend to reinvest the sale proceeds in another homestead property, and instead used a portion of the sale proceeds to finance his move to Massachusetts. The homeowner listed the sale proceeds as exempt on his schedule, and the trustee objected to the claim of exemption and requested turnover of the sale proceeds. The bankruptcy court ruled in favor of the trustee, holding that the homeowner lacked the requisite intent to reinvest the sale proceeds and was not entitled to the homestead exemption and ordering turnover. The homeowner appealed, and the district court, deferring to the bankruptcy court's factual determination that the

homeowner lacked the requisite intent to claim the homestead exemption, affirmed the turnover order.

Pride Family Brands, Inc. v. Carls Patio, Inc.,

2013 WL 4647216 (S.D. Fla. Aug. 29, 2013) (Simonton, J.).

- Section/Rule/Keywords: 11 U.S.C. § 362; Fed. R. Civ. P. 45; violation of the automatic stay; protective order

- Summary: Debtor sought protective order to prevent plaintiff from taking the deposition of the debtor's officer and alleged that the service of the subpoena was in violation of the automatic stay. The court determined that the plaintiff's efforts to take discovery in connection with its claims against non-debtor parties did not violate the automatic stay. However, the court ultimately quashed the subpoena due to the plaintiff's failure to properly serve the deponent by mailing the subpoena to the debtor's business address and failure to include attendance and mileage fees.

Stettin v. U.S.,

2013 WL 4028150 (S.D. Fla. Aug. 7, 2013) (Rosenbaum, J.).

- Section/Rule/Keywords: 11 U.S.C. § 548; forfeiture

- Summary: The district court affirmed the bankruptcy court's determination that a trustee is precluded from bringing a fraudulent transfer action against the federal government outside of criminal forfeiture proceedings relating to Scott Rothstein. Rothstein transferred funds from the Rothstein Rosenfeldt Adler P.A. ("RRA") account to a bank account to fund the purchase of a home for Rothstein's wife's bodyguard. The note and mortgage were in favor of Fifth Court Financial LLC ("Fifth Court") an entity owned by Rothstein, not RRA. In the criminal forfeiture proceedings, all assets held by or owed to Fifth Court were forfeited to the United States. The trustee appealed the final order of forfeiture to the Eleventh Circuit. The Eleventh Circuit remanded the matter to the district court to determine whether the properties were purchased using RRA funds. The bodyguard interpled funds to fully satisfy the mortgage, and the issue arose as to whether the funds were property of RRA's bankruptcy estate or owed to the government. The district court concluded the appeal was not ripe because the district court had not resolved the issues remanded by the Eleventh Circuit.

Bankruptcy Court Opinions

In re Alonso,

495 B.R. 53 (Bankr. M.D. Fla. Aug. 2, 2013) (Delano, J.).

- Section/Rule/Keywords: 28 U.S.C. § 158(d)(2)(A)(i)—(iii); certification of direct appeal; strip-off; *Dewsnup*; *McNeal*

- Summary: The bankruptcy court granted a debtor's motion to strip-off a wholly unsecured second mortgage in accordance with the Eleventh Circuit's *In re McNeal* decision. A creditor filed for certification of direct appeal to the Eleventh Circuit, arguing the bankruptcy court should not have followed *McNeal* because that case has a pending petition for rehearing en banc, is not a final order, is not binding precedent because it was an unpublished opinion, and because it was wrongly decided as a matter of law. The bankruptcy court refused to grant certification based on the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)—(iii) because the Eleventh Circuit will likely resolve the issue raised in the creditor's appeal upon deciding the appeal from its *McNeal* decision.

CIB Marine Capital, LLC v. Herman (In re Herman),

495 B.R. 555 (Bankr. S.D. Fla. Aug. 6, 2013) (Olson, J.).

- Section/Rule/Keywords: 11 U.S.C. § 727; 11 U.S.C. § 541; actual fraud; denial of discharge; false oath

- Summary: Attorney who had been working on several large contingency fee cases filed a chapter 7 petition shortly before favorable judgments were entered in the contingency fee cases. The attorney did not disclose his interests in the contingency fee judgments on his bankruptcy schedules and also made several pre-bankruptcy transfers to his ex-wife. Several creditors as well as the U.S. Trustee objected to the attorney's discharge on account of his failure to disclose his interests in the contingency fee judgments and his allegedly fraudulent pre-bankruptcy transfers. The bankruptcy court determined that the attorney's interests in the contingency fee judgments were property of the estate, that his firm did not have discretion to deny him a bonus based on the favorable judgments in the contingency fee cases, and that the attorney's level of sophistication coupled with his failure to disclose his interests in the contingency fee cases indicated that he intended to hinder, delay, and defraud his creditors.

Moreover, the bankruptcy court held that the attorney's pre-bankruptcy transfers to his ex-wife provided an independent ground for denying the attorney's discharge. Accordingly, the bankruptcy court denied the attorney's discharge.

In re McKinnon,

495 B.R. 553 (Bankr. M.D. Fla. Aug. 27, 2013) (Williamson, J.).

- Section/Rule/Keywords: 11 U.S.C. § 522(g); exemptions

- Summary: Prior to filing bankruptcy, debtor transferred his automobile to his daughter. The Trustee had the transfer avoided as a fraudulent transfer, and the debtor thereafter claimed the automobile as exempt under section 522(g). The Trustee argued that section 522(g) was unavailable because, while the debtor did not conceal the transfer, he made the transfer voluntarily within the meaning of section 522(g). The debtor contended that section 522(g) only prevented him from claiming the property as exempt if the trustee proved both that the transfer was voluntary and that he concealed the transfer. The bankruptcy court held that section 522(g) contains a disjunctive test, and accordingly, that the trustee was correct in objecting to debtor's claim of exemption, as the debtor voluntarily transferred the car to his daughter.

Solowsky v. Reyes (In re Reyes),

2013 WL 4027127 (Bankr. M.D. Fla. Aug. 2, 2013) (Cristol, J.).

- Section/Rule/Keywords: 11 U.S.C. §§ 727(a)(2)(B), 727(a)(4)(A)

- Summary: Creditor sought to deny debtor his discharge based on an alleged post-petition transfer of property from a corporation owned solely by the debtor to another entity in which the debtor had no interest to hinder, delay, and defraud creditors. Debtor was adversely impacted by his prior counsel's representation and several errors and omissions from the initial schedules filed by the debtor. The errors were corrected by the debtor's current counsel. The court ultimately concluded that the denial of the debtor's discharge was not the appropriate remedy.

In re New River Dry Dock,
2013 WL 4014786 (Bankr. M.D. Fla. Aug. 5, 2013) (Olson J.).

- Section/Rule/Keywords: disgorgement, contempt order

- Summary: Realty company and broker had previously been ordered to disgorge real estate commissions in the amount of $490,000.00 as a result of non-disclosure and fraud on the bankruptcy court. The realty company and the broker agreed to pay certain amounts and an agreed order was entered, but the realty company and the broker failed to pay any amounts due. At the hearing on the motion to compel, counsel for the broker and the realty company indicated he intended to withdraw and did not object to the relief sought by the motion to compel. The bankruptcy court granted the motion to compel and entered an order holding the realty company and broker in contempt. Counsel for the realty company and the broker never filed a motion to withdraw, and through the same counsel, the broker then sought reconsideration of the order based on excusable neglect and an inability to pay, although the broker made transfers to his son during the same period. In denying the motion for reconsideration, the court concluded that broker had the burden of demonstrating a present and complete inability to pay and had failed to so.

Kelly v. Michigan Finance Authority --- Student Loan Programs (In re Kelly),
--- B.R. ----, 2013 WL 4157060 (Bankr. M.D. Fla. Aug. 7, 2013) (Jennemann, J.).

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(8); *Brunner* Test, Student loan debt; undue hardship

- Summary: Husband and wife incurred over $160,000 in student loan debt and sought to have remaining portion of that debt discharged in bankruptcy. The bankruptcy court determined that the debtors' income had been understated and their expenses were understated such that the debtors could realistically reduce their expenses and pay off their student loan debt in full. Specifically, the court found that while the debtors were not expected to live in poverty, they could reduce expenses and should expect their financial situation to improve as they paid off other liabilities including their automobile loans. Accordingly, they could not demonstrate an inability to maintain a minimal standard of living or that their financial affairs would not improve sufficiently to warrant repayment.

Webber v. American Cancer Treatment Centers, Inc. (In re Makar),

2013 WL 4483462 (Bankr. M.D. Fla. Aug. 15, 2013) (Jennemann, J.).

- Section/Rule/Keywords: 11 U.S.C. §§ 548, 550; summary judgment; alter ego; piercing the corporate veil; *Stern v. Marshall*

- Summary: Debtor lost a state court lawsuit involving breach of an employment agreement and subsequently filed bankruptcy. Prior to bankruptcy, the debtor transferred over $8,000,000.00 into various personal and business bank accounts and made various non-business related purchases and transactions. On motion for summary judgment, the bankruptcy court found it had jurisdiction in light of *Stern v. Marshall* to determine whether the transfers were avoidable and recoverable under sections 548 and 550, and determined that the transfers were in fact avoidable and recoverable for the benefit of the estate. The bankruptcy court also held that the business entities that the debtor used to hide his assets were his "alter ego" and further allowed the trustee to pierce the corporate veil.

Antaramian Properties, LLC v. Basil Street Partners, LLC (In re Basil Street Partners, LLC),

2013 WL 4461566 (Bankr. M.D. Fla. Aug. 19, 2013) (Delano, J.).

- Section/Rule/Keywords: Fed. R. Bankr. P. 7008(b); prevailing party attorney's fees; alter-ego; taxable costs

- Summary: Guarantors prevailed in a state court foreclosure action that was removed to bankruptcy court, and the bankruptcy judge determined that co-defendant guarantors had breached their fiduciary duties to the guarantors and held that the guaranties were unenforceable. The guarantors moved for an award of attorney's fees and costs, and the co-defendant guarantors argued that fees and costs could not be awarded because the guarantors were not prevailing parties, had not made certain co-defendant guarantors parties to the underlying action, had not specifically pled their claim for attorney's fees, fees were not available under FRBP 7008(b), and that the guarantors could not recover their taxable costs. The bankruptcy court awarded fees but not costs, holding that (i) the guarantors had prevailed on each count in which it was named as a defendant, (ii) the co-defendant guarantors were liable under an alter-ego theory, (iii) the claim for attorney's fees did not have to be specifically pled under Florida law, (iv) Fed. R. Bankr. P. 7008(b) did not apply because parties' entitlement to

attorney's fees is a matter of state substantive law, (v) and Florida's mutual attorney's fees statute does not provide for an award of costs.

Waters v. JPMorgan Chase Bank, NA (In re Waters),

2013 WL 4479091 (Bankr. M.D. Fla. Aug. 20, 2013) (Jennemann, J.).

- Section/Rule/Keywords: 11 U.S.C. § 542(a)(2); 28 U.S.C. § 1334(c); Fed. R. Civ. P. 12(b)(6); discharge injunction

- Summary: The debtors reopened their chapter 7 case to assert that mortgagee violated the discharge injunction by attempting to reform a mortgage against their residence to correct an incorrect legal description. The debtors sought to enjoin the mortgagee and requested that the bankruptcy court declare the mortgage lien invalid. In their chapter 7 case, the debtors had indicated that they intended to reaffirm the debt owed to the mortgagee, but never did so. The court concluded that the reformation action was an in rem proceeding and that the mortgagee did not violate the discharge injunction. The court also abstained from resolving the controversy relating to the validity of the mortgagee's lien.

In re Castellon,

2013 WL 3396795 (Bankr. S.D. Fla. Aug. 21, 2013) (Cristol, J.).

- Section/Rule/Keywords: informal proof of claim

- Summary: A debtor executed several guaranty agreements and subsequently filed for bankruptcy after the primary obligors on the guaranties defaulted and the debtor along with the primary obligors were sued in state court. The bank holding the guaranties did not file a proof of claim in the bankruptcy case, but did appear at and participate in the debtor's 341 meeting. The bank also filed a motion for relief from the automatic stay to proceed with state court actions against the primary obligors and to evict the debtors. The bankruptcy court held that the bank satisfied the informal proof of claim standard because (i) its stay relief motion described with sufficient detail the loan transactions with the primary obligors, the guaranty obligations with the debtor, the underlying collateral, the amount of the scheduled debts in relation to the collateral, as well as the state court foreclosure actions, and (ii) indicated that the bank was a creditor of the estate and intended to participate in any recoveries from the estate by reserving its right to dispute the debtor's valuation of the collateral and the amount of its debt.

In re Digital Community Networks, Inc.,

--- B.R. ----, 2013 WL 4519411 (Bankr. M.D. Fla. Aug. 27, 2013) (Williamson, J.).

- Section/Rule/Keywords: 11 U.S.C. § 365, 541; property of the estate; judicial estoppel; executory contracts

- Summary: A cable company filed for bankruptcy and confirmed a plan in which it created an LLC that would be assigned the debtor's cable service contracts. After confirmation, the new LLC sued a prior account holder for breaching its cable service contract. The account holder asked the bankruptcy court to declare that the cable service contract constituted property of the estate, and was rejected in the bankruptcy case. The bankruptcy court held that the account had been sold by the debtor to a third-party prior to the petition date and was not property of the estate and that the doctrine of judicial estoppel did not apply to the debtor's attempt to recharacterize the transaction at issue because even if the debtor had taken inconsistent positions regarding the nature of the contract it had not done so to make a mockery of the judicial system.

Wells Fargo Bank, N.A. v. Kendrick (In re Kendrick),

2013 WL 4518654 (Bankr. M.D. Fla. Aug. 27, 2013) (Briskman, J.).

- Section/Rule/Keywords: 11 U.S.C. § 523; 28 U.S.C. § 1920; judicial notice

- Summary: Bank sought reconsideration of bankruptcy court's order finding that debtor's responses to a personal financial statement were reasonable and that loans made from the bank to the debtor were dischargeable. Debtor moved for an award of attorney's fees and costs under California law. Bankruptcy court held that bank's requests for judicial notice, which asked the court to take judicial notice of the meaning of the phrase "declare bankruptcy" were improper as the meaning of that phrase was not beyond dispute. Moreover, the bankruptcy court held that attorney's fees could not be awarded pursuant to California's reciprocal attorney's fee provision because a section 523 action was not a suit "on the contract." Finally, the bankruptcy court did award the debtor costs for photocopying expenses under 29 U.S.C. § 1920.

In re Mayer,
2013 WL 4608938 (Bankr. M.D. Fla. Aug. 29, 2013) (Delano, J.).

- Section/Rule/Keywords: 11 U.S.C. § 1322; 11 U.S.C. § 1325

- Summary: Bankruptcy court granted motion for reconsideration of prior ruling in which it held that debtor could not confirm her chapter 13 plan on account of owing a fully matured mortgage secured by her principal residence. However, the court granted reconsideration based on section 1322(c), which allows for debtors to confirm a chapter 13 plan where the debtor owes a fully secured mortgage on their principal residence in which the final payment on the original payment schedule is due before the date on which the final plan payment becomes due.

Haas v. Shults (In re Shults),
2013 WL 4072509 (Bankr. M.D. Fla. Aug. 13, 2013) (Delano, J.)

- Section/Rule/Keywords: contract/mortgage reformation

- Summary: Buyer and seller executed a mortgage and note, the terms of which secured the purchase price for a 45 acre parcel of land. The mortgage contained an option to purchase an additional five acres containing a hangar structure. In order to facilitate the option, the seller executed a mortgage the terms of which secured the purchase price for the five acre parcel and hangar structure. When the buyer subsequently exercised the purchase option for the five acre parcel, the buyer and seller executed a mortgage modification. However, the mortgage modification did not include the proper description for the five acre parcel, leaving it unsecured. The buyer subsequently encumbered the whole 50 acre parcel including the five acre parcel and hangar structure with a second mortgage. When the buyer defaulted and declared bankruptcy several years later, the seller sought a reformation of the mortgage to include the five acre parcel. The bankruptcy court found that based on the intent of the parties and language contained in other portions of the mortgage modification the mortgage should be reformed to include the five acre parcel.

In re Valcarel,

2013 WL 4097193 (Bankr. S.D. Fla. Aug. 12, 2013) (Cristol, J.)

- Section/Rule/Keywords: 11 U.S.C. § 506, strip down, *Dewsnup*

- Summary: Condominium owner filed a chapter 7 petition and obtained a discharge. The condominium owner owed the condominium association $15,000.00 in association dues, but the association claimed it never received notice of the bankruptcy case. After the owner obtained his discharge he continued to fail to make payments to the association. The association instituted a lien foreclosure action against the owner, and the owner filed a chapter 13 petition. The association asserted a secured claim in the amount of $37,356.27, and the debtor objected to that valuation --- asserting a portion of that debt was discharged in the chapter 7 case, and that since the association did not file a claim of lien in the public records prior to the petition its claim should be classified as unsecured. The bankruptcy court held that (i) Chapter 718, Fla. Stat., gave the association an automatic lien that relates back to the recording of the original condominium declaration, (ii) even where a lien exceeds the value of the collateral it secures, the lien stays with the property *in rem* in the full amount notwithstanding bankruptcy, and (iii) the debtor's failure to notify the association of the no asset chapter 7 case is irrelevant to the court's determination.

Cabuya Cherokee v. Vogt (In re Vogt),

--- B.R. ----, 2013 WL 4571897 (Bankr. M.D. Fla. Aug. 28, 2013) (Williamson, J.)

- Section/Rule/Keywords: Fed. R. Bankr. P. 9019; standing; court approval of proposed compromise

- Summary: Debtor filed a chapter 11 petition after a failed real estate development project. The debtor proposed several plans, all of which provided for the main creditor in the case, and the debtor and the primary creditor submitted a proposed confirmation order. The debtor and the primary creditor also executed a settlement agreement almost contemporaneously with the confirmation order. However, the confirmation order did not include the terms of the settlement agreement. The settlement order required the debtor to surrender a large amount of property in the event of a default. After the debtor defaulted under the settlement agreement, he along with his wife filed a chapter 7 petition. The bankruptcy court ruled that the settlement agreement was not enforceable because it had not been approved by the court or included in the confirmation

order, which deprived other creditors of due process. On motion for reconsideration, the bankruptcy court held that the trustee lacked standing to rescind the settlement agreement, that the settlement failed to provide creditors with due process, and that because the confirmation order did not specifically incorporate the terms of the settlement agreement it could not be given preclusive effect.

In re W.B. Care Center, LLC,

2013 WL 4718932 (Bankr. S.D. Fla. Aug. 30, 2013) (Olson, J.)

- Section/Rule/Keywords: *Barton* Doctrine; 28 U.S.C. § 959

- Summary: Debtor, a nursing home company, filed for bankruptcy. Managing member of the nursing home attempted to embezzle $50,000.00 during the pendency of the bankruptcy case, which led the bankruptcy court to reject a settlement agreement under which the managing member would have received $500,000.00. The case was subsequently converted from chapter 11 to chapter 7, and the managing member attempted to sue the chapter 7 trustee alleging RICO violations. The bankruptcy court held that the RICO suit could not proceed in district court under the *Barton* doctrine, which required all suits against receivers, trustees, and debtors-in-possession to be approved by the bankruptcy court. In so doing, the bankruptcy court held that the *Barton* doctrine extended to protect professionals employed by a debtor's bankruptcy estate.