Florida Bankruptcy Case Law Update

January 2015 Cases

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Eleventh Circuit Opinions

Iberiabank v. Geisen, et. al. (In re FFS Data, Inc.)

---F.3d---, 2015 WL 294269 (11th Cir. Jan. 23, 2015)

- Section/Rule/Keywords: confirmed Chapter 11 plan, release in plan, principal, guarantor

- Summary: Bank appealed district court decision affirming a bankruptcy court order ruling all of Bank's claims against the Chapter 11 debtor's principal were released under a confirmed plan of reorganization. The debtor corporation had guaranteed a loan incurred by a company owned 100% by the debtor's principal. Bank filed a proof of claim in the debtor's case as a general unsecured creditor. The debtor's plan included multiple provisions that all holders of claims agreed to release the principal (who was specifically named) in exchange for the principal contributing $750,000 to the bankruptcy estate, and for releasing more than $1 million in unsecured claims held against the estate. Bank did not attend the confirmation hearing or object to the plan. Bank later argued the release provisions of the plan were limited to claims against the principal in his capacity as an officer or director of the debtor. The Eleventh Circuit affirmed the district court and held the confirmed plan included a general release of all claims against the principal, including claims arising out of his personal guaranty to the Bank. The Eleventh Circuit further held the release language was specific enough to have res judicata effect on the Bank's claim against the principal.

District Court Opinions

Club at Shores of Panama, Inc. v. FDIC et al.

2015 WL 402381 (N.D. Fla. Jan. 18, 2015) (Smoak, J.)

- Section/Rule/Keywords: Fed. R. Civ. P. 60(b)(4) 11 U.S.C. § 363(f), sale of assets

- Summary: Appellant landowner entities related to the debtor entity appealed Bankruptcy Court order denying relief under Rule 60(b)(4). Appellants filed a Rule 60(b)(4) motion to overturn a Bankruptcy Court order granting a third-party creditor's motion to sell the debtor's property free and clear under § 363(f), which sale property included certain easement rights. The debtor had objected to the sale motion, arguing the easement rights could not be sold, but Appellants did not join in the objection. Over four years later, Appellants moved for relief from the sale order under FRCP 60(b)(4), arguing among other things that the Bankruptcy Court lacked jurisdiction over the purchasers and the easements. The Bankruptcy Court denied the motion without hearing. On appeal, the District Court found the real issue under § 363(f)(2) was whether the Bankruptcy Court was clearly erroneous when it determined that the Appellants consented to the sale of the easements. The District Court held the Bankruptcy Court's determination that the Appellants expressly and impliedly consented to the sale order was not clearly erroneous.

Petricca, et al. v. Jensen (In re Petricca)

2015 WL 300280 (M.D. Fla. Jan. 22, 2015) (Chappell, J.)

- Section/Rule/Keywords: 28 U.S.C. § 1915, in forma pauperis

- Summary: Appellant filed a notice of appeal and motion to proceed *in forma pauperis* (IFP) with the Bankruptcy Court. The trustee filed a response opposing the motion to proceed IFP, noting Appellant had bid up to $59,500.00 for property being sold by auction conducted by the trustee, and that Appellant had paid $1,000.00 as a down payment. The trustee further noted Appellant had among his assets two claims worth $149,786.42. The Bankruptcy Court denied the motion to proceed IFP for the reasons stated by the trustee, and the District Court affirmed.

• Bankruptcy Court Opinions

In re Bodensiek

522 B.R. 737 (Bankr. S.D. Fla. 2015) (Kimball, J.)

- Section/Rule/Keywords: 11 U.S.C. § 506, 11 U.S.C. § 554(a), strip off, homestead property, abandoned property

- Summary: Chapter 7 debtor filed a motion to value and determine secured status of lien on real property, seeking to strip off the wholly unsecured second mortgage on his homestead property. Before the debtor filed the motion, however, the Chapter 7 trustee formally abandoned the homestead property under 11 U.S.C. § 554(a), raising the question whether the Bankruptcy Court has the authority to strip off a wholly unsecured lien even if the property to which the lien attaches is no longer subject to administration. The Bankruptcy Court adopted the reasoning of Justice Scalia's dissent in *Dewsnup v. Timm*, 502 U.S. 410 (1992), to hold the Court may grant a motion to value and strip liens under § 506 without regard to whether the collateral has been abandoned by the estate because § 506 automatically operates upon all property in which the estate has an interest at the time the bankruptcy petition is filed.

Mukamal v. Ark Capital Group, LLC, et. al. (In re Kodsi)

2015 WL 222493 (Bankr. S.D. Fla. Jan. 14, 2015) (Isicoff, J.)

- Section/Rule/Keywords: substantive consolidation, alter ego

- Summary: On adversary defendant's motion to dismiss, the Bankruptcy Court addressed two main issues: (1) whether the Chapter 7 trustee may sue a defendant company on the theory that the company is the alter ego of the individual Chapter 7 debtor; and (2) whether non-debtor entities may be substantively consolidated in the Chapter 7 proceeding. The Bankruptcy Court reasoned that an alter ego claim brought by an individual against his own company makes no sense, and accordingly a bankruptcy trustee, standing in the shoes of the individual debtor, has no such claim either. On the substantive consolidation issue, the Bankruptcy Court refused the trustee's invitation to reconsider her prior ruling in *Kapila v. S & G Fin. Servs., LLC*, *(In re S & G Fin. Servs. Of S. Florida, Inc.)* 451 B.R. 573 (Bankr. S.D. Fla. 2011), in which the

Court held she could substantively consolidate a non-debtor entity with the debtor.

In re Scrub Island Development Group Ltd., et. al.

523 B.R. 862 (Bankr. M.D. Fla. 2015) (Williamson, J.)

- Section/Rule/Keywords: FRBP 8005, 11 U.S.C § 105, stay pending appeal, jurisdiction

- Summary: Bank moved for stay pending appeal of a confirmation order entered after an eight-day trial on confirmation, during which the bank's objections to confirmation were overruled. Under FRBP 8005, the Bank had to demonstrate (1) it had a likelihood of success on the merits of its appeal; (2) it would suffer irreparable harm if the Court did not stay the confirmation order; (3) the debtors would not be substantially harmed if the confirmation order is stayed; and (4) the public interest would be served if the confirmation order is stayed. The Bankruptcy Court addressed each prong of the test and ultimately found the bank could not establish any of the four elements for obtaining a stay. In addressing the Bank's argument as to likelihood success of its appeal, the most important element, the Bankruptcy Court determined it had jurisdiction to affect the Bank's interest in property located in the British Virgin Islands, and that it had statutory authority to enjoin the Bank from pursuing non-debtors, among other things.

Herrera-Edwards v. Moore (In re Herrera-Edwards)

---B.R.---, 2015 WL 410630 (Bankr. M.D. Fla. Jan. 29, 2015) (May, J.)

- Section/Rule/Keywords: 11 U.S.C. §§ 327, 330, 503(b), claim objection, administrative expense

- Summary: Individual Chapter 11 debtor objected to claims filed by her former consultant, and filed an adversary complaint against consultant seeking to recover fees under breach of contract, administrative expense, and quantum meruit theories. The claims arose from a consulting agreement the debtor contended was procured by the consultant's fraud. After a six-day trial on the issues between the parties, the Bankruptcy Court sustained the debtor's objections to claims, finding the consultant agreement was procured by fraud under Florida law when the consultant represented to the debtor that he was in a "unique position" to recover $500,000 or more for the debtor in connection with

the underpayment of royalties owing to her from her late husband's music copyrights (including for the popular songs "Le Freak," "We are Family," "Dance, Dance, Dance," and "Getting' Jiggy with It"). The Bankruptcy Court further awarded judgment in favor of the debtor and against the consultant on all counts, including the consultant's claim to an administrative expense under 11 U.S.C. §§ 327 and 330, because his employment was never approved. The Court further denied the consultant's administrative expense claim under 11 U.S.C. § 503(b)(1)(A) as a necessary cost of preserving the estate, stating that section is not to be used by unapproved professionals to avoid the requirements of § 503(b)(2) and §§ 327 and 330(a).

Fisher Island Investments, Inc. et al. v. Areal Plus Group et al. (In re Fisher Island Investments, Inc., et al.)

2015 WL 148449 (Bankr. S.D. Fla. Jan. 9, 2015) (Cristol, J.)

- Section/Rule/Keywords: common interest privilege

- Summary: Alleged debtors in involuntary Chapter 11 proceeding/plaintiffs in adversary proceeding filed a motion to overrule privilege objections made in response to discovery requests, and to compel production of documents. The adversary proceeding related to whether the defendants wrongfully secured an *ex parte*, $32 million "confession" judgment in New York state court against the alleged debtors while they were subject to previously filed involuntary bankruptcy proceedings. The adversary complaint requested injunctive relief against the enforcement of the judgment and damages. One defendant, a law firm, withheld discovery responses relying on the "common interest" privilege (an exception to the general rule that a party waives its attorney-client privilege when it discloses privileged information to third-parties). The Bankruptcy Court held the defendant law firm could not rely on the common interest privilege because there was no common legal interest between the defendant, who purported to represent the alleged debtors at the time, and the petitioning creditors, since their interests were adverse in the context of the bankruptcy case.

Galaz v. Monson, II (In re Monson, II)

522 B.R. 721 (Bankr. M.D. Fla. 2015) (Glenn, J.)

- Section/Rule/Keywords: 11 U.S.C. §§ 523(a)(2), (a)(4), and (a)(6), exception to discharge

- Summary: Plaintiff filed nondischargeability action under 11 U.S.C. §§ 523(a)(2), (4), and (6), alleging a loan procured by the debtor for the start-up and operation of an internet center was either obtained by fraud or embezzlement, or was otherwise nondischargeable because the debtor willfully and maliciously injured plaintiff's property. After holding a final evidentiary hearing on all issues, the Bankruptcy Court held the debt owed to plaintiff was not nondischargeable under § 523(a)(2) or (4), but that it was nondischargeable under § 523(a)(6) because the debtor injured plaintiff's right to recover the loan when he removed the center's equipment to another county and used it in a new business without the lender's knowledge or permission.

In re Trigeant Holdings, Ltd., et. al.

523 B.R. 273 (Bankr. S.D. Fla. 2015) (Kimball, J.)

- Section/Rule/Keywords: 28 U.S.C. § 1961, claim objection, judgment interest, judicial estoppel

- Summary: The debtors and their principals objected to a portion of a judgment creditor's claim on the basis that interest accrued after a judgment confirming an arbitration award exceeded the statutory maximum rate set by 28 U.S.C. § 1961. That section provides that judgments in the federal courts carry a mandatory interest rate "equal to the weekly average 1-year constant maturity Treasury yield…for the calendar week preceding" the entry of the judgment. Because the judgment did not award interest at any specified rate, and because there was no evidence the parties specifically contracted around § 1961, the Bankruptcy Court sustained the objection to the extent the judgment creditor's claim included interest calculated at a rate higher than that provided for under § 1961, which in this case was 0.39% per annum. The Bankruptcy Court also held one of the debtors was not judicially estopped from objecting to the judgment creditor's claim, even though it had referred to the higher claim amount (as calculated with 18% interest) in filings in its earlier bankruptcy case.

Brook v. JP Morgan Chase Bank, N.A., et. al. (*In re Burdett)*

2015 WL 150848 (Bankr. M.D. Fla. Jan. 12, 2015) (May, J.)

- Section/Rule/Keywords: Fla. Stat. § 559.55, prevailing party attorneys' fees

- Summary: Plaintiff, Chapter 7 trustee, moved for attorneys' fees after prevailing in adversary proceeding against bank on two out of three counts related to the bank's harassment of the debtor in violation of Fla. Stat. § 559.55, *et seq.* (aka the Florida Consumer Collection Practices Act ("FCCPA")). Although the trustee prevailed on her first two allegations of harassment and contact with the debtor after being informed that the debtor had retained an attorney, the bank prevailed on the third allegation of attempting to enforce an illegitimate debt and on its setoff defense, which negated any recovery by the trustee. On the trustee's request for attorneys' fees, the Bankruptcy Court considered three issues: whether the trustee was the "prevailing" party, whether the amount of attorneys' fees requested was reasonable, and whether the trustee may recover fees incurred while litigating for fees (i.e. fees-for-fees). The Bankruptcy Court determined the trustee was the prevailing party, even though the bank prevailed on one count and established its setoff defense, because the FCCPA does not contain an "overall prevailing party" requirement and expressly awards fees incurred by the plaintiff in any action under FCCPA in which the person who fails to comply with § 559.72 is found liable for actual damages. The Bankruptcy Court also held the trustee was entitled to fees-for-fees because it furthers the purpose of the FCCPA to protect Florida consumers from proscribed practices of debt collectors.

Accel Motorsports Inc. v. Rosario (In re Rosario)

2015 WL 232427 (Bankr. M.D. Fla. Jan. 13, 2015) (Jennemann, J.)

- Section/Rule/Keywords: 11 U.S.C. §§ 523(a)(2)(A) and (a)(6), nondischargeable, collateral estoppel

- Summary: Plaintiff car dealer sought entry of a default judgment against the debtor/defendant determining that its $124,400 state court default judgment was nondischargeable under §§ 523(a)(2)(A) and (a)(6). Plaintiff argued the state court judgment was entitled to collateral estoppel effect, and on that basis, the entire judgment was nondischargeable. The Bankruptcy Court held that collateral estoppel applied with respect to the fraud and conversion portion of the state court judgment under §§ 523(a)(2)(A) and (a)(6). However, the Court also held plaintiff failed to establish a basis for determining the portion of the judgment

related to $75,300 of worthless checks transferred *after* the defendant took possession of the related vehicles was nondischargeable under § 523(a)(2)(A) because plaintiff failed to show its justifiable reliance on the worthless checks.

In re Obregon

2015 WL 359250 (Bankr. S.D. Fla. Jan. 27, 2015) (Cristol, J.)

- Section/Rule/Keywords: 11 U.S.C. § 1325(a)(4), Chapter 13 plan, confirmation, best interest test

- Summary: Chapter 13 debtor confirmed a plan that provided for a total distribution to unsecured creditors of only $9,300.28, but which also provided that "the Debtor will modify the Chapter 13 Plan to increase the amounts to be paid in to provide for a 100% distribution to allowed unsecured claims." Three years after confirmation, a bank filed three proofs of claim for unsecured student loan debts. The Chapter 13 trustee then made plan payments to the bank for nearly two years, totaling $2,871.27. Then, two years after the claims were filed, the debtor objected to the bank's proofs of claim as being late filed, and the Bankruptcy Court sustained the debtor's objection. A year later, the trustee filed her motion to dismiss the Chapter 13 case on the basis that the debtor had not paid into the confirmed plan sufficient funds to pay all of the allowed unsecured claims as per the plan and in accordance with the best interest test. The debtor argued the trustee should recover the funds paid to the bank or that the Court should simply grant the debtor a discharge on the basis of the funds paid into the plan already. The Bankruptcy Court held the debtor was bound by the confirmed plan, which required the debtor to pay 100% of allowed unsecured claims based on the best interest of creditors test under § 1325(a)(4). Accordingly, the Bankruptcy Court ordered the debtor to remit to the trustee within thirty days the remaining $1,492.89 due under the plan, plus trustee's fees, in order to receive a discharge, or the case would be dismissed without entry of the debtor's discharge.

In re Hernandez

2015 WL 393410 (Bankr. M.D. Fla. Jan 28, 2015) (Funk, J.)

- Section/Rule/Keywords: 11 U.S.C. § 1329(b)(1), chapter 13 plan, increase payments

- Summary: Chapter 13 trustee moved to modify debtors' confirmed Chapter 13 plan based on tax returns that indicated the debtors had significantly more income available to them with which to fund the plan and make payments to unsecured creditors. The trustee's office received the debtors' 2012 tax return three days prior to the confirmation hearing, which showed adjusted gross income of $177,887.00. However, at confirmation the trustee relied instead on six months of payment advices showing annualized income of only $114,460.20 to evaluate the debtors' disposable income. The trustee then moved to modify the plan under § 1329(b)(1) after receiving the debtors' 2013 tax return, which showed adjusted gross income of $173,645.00, arguing the plan should be amended based on the $59,185.00 increase in income as compared to the estimated income based on the payment advices. The Bankruptcy Court held the trustee could not show a substantial, unanticipated change in the debtors' income because the trustee was in possession of the 2012 tax return before confirmation, and thus had notice that the debtors' income may have been greater than as projected by the payment advices. However, the Bankruptcy Court did order the debtors to pay their 2013 tax refund into the plan.

Coyle v. United States of America (In re Coyle)

---B.R.---, 2015 WL 455930 (Bankr. S.D. Fla. Jan. 14, 2015) (Mark, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(1)(B)(ii), discharge, tax return

- Summary: Chapter 7 debtor filed adversary proceeding to determine the dischargeability of her income tax debt for years 2006 and 2007 under 11 U.S.C. § 523(a)(1)(B)(ii). On cross motions for summary judgment, the issue was whether the debtor's untimely Form 1040 for 2006, filed after the IRS assessed her tax liability, was considered a "return" as that term is used in 11 U.S.C. § 523(a)(1)(B). After surveying case law from around the country on this issue, the Bankruptcy Court followed the majority of courts that apply the test set forth in *Beard v. Commissioner of Internal Revenue*, 82 T.C. 766 (1984) (aka the Beard Test) in holding that late returns filed after an IRS assessment are not "returns."

Accordingly, the debtor's tax liability for 2006 was excepted from discharge because § 523(a)(1)(B)(ii) requires a "return" to have been filed.

J. Thompson Investments, LLC, et. al. v. Soderstrom (In re Soderstrom)

---B.R.---, 2015 WL 273313 (Bankr. M.D. Fla. Jan. 22, 2015) (Jennemann, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(2)(A), false representation, discharge

- Summary: Investor in failed real estate development filed adversary proceeding under § 523(a)(2)(A) to except from the debtor's discharge $831,000 under theories of false pretenses, false representation, and actual fraud. After conducting an evidentiary hearing, the Bankruptcy Court found the debtor made a false representation to the investor when he stated his investment of $800,000 would be used to complete a build-out when, in fact, the debtor really wanted the investment monies to immediately repay himself and to divest himself of any meaningful interest in the development project. The Bankruptcy Court further found that the investor justifiably relied on the debtor's statement concerning the use of the investment funds. Thus, the Bankruptcy Court determined the investor's loss attributable to the debtor's false representations in the amount of $811,000 was nondischargeable under § 523(a)(2)(A).

In re Knott

2015 WL 251705 (Bankr. M.D. Fla. Jan. 20, 2015) (Jennemann, J.)

- Section/Rule/Keywords: 11 U.S.C. § 363(b), motion to sell, best interest of creditors

- Summary: Chapter 7 trustee moved to sell the debtor's interest in a state court lawsuit with his former business partner. The debtor and his co-plaintiffs in the state court suit objected, arguing the trustee abandoned the claim and that the proposed $5,000 sale price was insufficient and not in the best interest of creditors. Also noteworthy was the fact that the proposed purchaser of the claim was the defendant in the state court action. The Bankruptcy Court ultimately denied the motion to sell because the state court case was close to resolution and because the sale price was *de minimis* compared to the claims of the

debtor's estate. However, the Court lifted the automatic stay to allow the debtor to pursue his individual claims in the state court case, and ordered that any monies recovered by the debtor must be paid to the Chapter 7 trustee for distribution to creditors.

In re Hinds-Santiago

2015 WL 239211 (Bankr. S.D. Fla. Jan. 16, 2015) (Cristol, J.)

- Section/Rule/Keywords: 11 U.S.C. § 1322(c)(2), chapter 13 plan

- Summary: Chapter 13 debtor filed a motion to determine secured status of a mortgage loan allegedly maturing during the Chapter 13 plan, seeking a determination that the secured creditor's claim could be treated under 1322(c)(2). Section 1322(c)(2) applies if the last payment on the "original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due." If § 1322(c)(2) applied to the loan, the debtor could modify the interest rate pursuant to § 1325(a)(5). The debtor argued § 1322(c)(2) applied because the original note between the parties had a September 1, 2017 maturity date, despite the fact that the debtor and secured creditor entered into a loan modification agreement that extended the maturity date to August 1, 2027, and the code uses the phrase "original payment schedule." The Bankruptcy Court rejected the debtor's argument, holding the phrase "original payment schedule" is better defined as the "payment schedule necessary to satisfy the note, which includes any modifications thereto." Thus, because the revised maturity date is well after the date of the last payment due under the plan, the secured creditor's claim did not fall under 1322(c)(2).

In re Santana

2015 WL 240482 (Bankr. S.D. Fla. Jan. 16, 2015) (Cristol, J.)

- Section/Rule/Keywords: Chapter 13 plan, confirmation

- Summary: Secured creditor objected to confirmation of Chapter 13 debtor's plan on the basis that the total amount of household income, including all contributions by a non-filing spouse, should be used in the determination of adequate protection payments pursuant to the mortgage modification mediation (MMM) program, where the property is held in tenancy by entireties. The debtor argued she complied with the MMM program guidelines, which require the debtor to pay 31% of her gross disposable income, and that such payments adequately

protect the secured creditor's interests because they cover the taxes and insurance and a portion of the principal and interest for the property. The Bankruptcy Court held in favor of the debtor, finding the MMM payment adequately protected the secured creditor and was fair and equitable.