Florida Bankruptcy Case Law Update

February 2015 Cases

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Eleventh Circuit Opinions

In re Fisher Island Investments, Inc.

--- F.3d ----, 2015 WL 729689 (11th Cir. Feb. 20, 2015)

- Section/Rule/Keywords: Rule 7001; 28 U.S.C. § 157; withdraw reference; involuntary.

- Summary: Following the death of a wealthy businessman, an ownership dispute over three entities arose between two factions, the Redmond Group (immediate family) and the Zeltser Group (former employee). Following international litigation, a group of petitioning creditors commenced three involuntary bankruptcies for the entities in dispute. Shortly after the involuntary petitions were filed, the Zeltser Group filed an, purportedly on behalf of the debtors, which consented to the bankruptcies. The Redmond Group responded that they were authorized to represent the debtors and the involuntary should be dismissed. At early hearings the Zeltser Group stated that the bankruptcy court is the appropriate forum for to determine the ownership dispute. The Court entered a scheduling order which set the ownership dispute as a contested matter. After an unfavorable examiner's report and the Redmond Group filed a motion for partial summary judgment, the Zeltser Group filed a motion to withdraw the reference based on, among other things, the *Stern* decision. The District Court denied the motion to withdraw the reference as untimely and because the Zeltser Group had consented to the Bankruptcy Court determining the ownership issue. Thereafter, the Bankruptcy Court found in favor of the Redmond Group on the ownership

issue and the District Court affirmed. The 11th Circuit found that the ownership issue, which concerned whether the involuntary was consented to, was a core matter and the Bankruptcy Court could enter a final judgment. Even if the ownership issue is non-core, the Zeltser Group consented to allow the Bankruptcy Court determine the issue. Finally, the 11th Circuit found that the ownership dispute could be resolved by contested matter rather than adversary proceeding because it did not fall within the ten types of matters in Rule 7001.

Stewart Title Guaranty v. Roberts-Dude (*In Re* Denise Roberts-Dude)

---Fed.Appx.---, 2015 WL 545463 (11th Cir. Feb. 11, 2015)

- Section/Rule/Keywords: 11 U.S.C. 523(a)(2)(A) dischargeability, justifiable reliance.

- Summary: Pre-petition the debtor and her spouse were allegedly involved in a fraud to sell real property without disclosing a deed of trust held by a bank for $1.9 million. Before the sale, the debtor provided an affidavit to the title company which did not disclose the deed of trust. The deed of trust was not properly recorded because it lacked the legal description of the property. Despite a title search, the title company did not discover the deed of trust and issued title insurance. After closing the bank demanded payment from the new purchaser and the title company paid the balance of the deed of trust. The title company sued the debtor and the debtor filed for bankruptcy. The title company commenced an adversary proceeding against the debtor alleging, among other things, fraud and a non-dischargeability action under 523(a)(2)(A). The Bankruptcy Court found the debt dischargeable under 523(a)(2)(A) because title company's reliance was not justifiable. The District Court reversed and the 11th Circuit affirmed the District Court. The 11th Circuit analyzed only whether the title company's reliance was justified. The 11th Circuit found that reliance is unjustifiable only where the fraud could be discovered by a cursory glance. In this case the title company performed a records search and did not discover the deed of trust. Additionally, it was improper for the Bankruptcy Court to consider the plaintiff's experience when determining whether reliance was justifiable. Accordingly, the 11th Circuit found that the title company's reliance was justifiable and the debt non-dischargeable.

In re Rosenberg

--- F.3d ----, 2015 WL 845578 (11th Cir. Feb. 27, 2015)

- Section/Rule/Keywords: 11 U.S.C. 303; involuntary; attorney's fees.

- Summary: A servicer for a creditor commenced an involuntary bankruptcy against a debtor on a guaranty based on a debt purportedly owed to the creditor. The debtor successfully moved for dismissal of the bankruptcy under § 303, which was sustained on appeal to the 11th Circuit. Thereafter, the debtor sought attorney's fees based on the involuntary petition and the petitioning creditor's bad faith. After affirmance by the District Court, The 11th Circuit reviewed the Bankruptcy Courts orders granting four categories of attorneys fees: (1) fees incurred to obtain the dismissal of an involuntary petition in the bankruptcy court; (2) fees incurred to sustain that dismissal on appeal to the district court and this 11th Circuit; (3) "fees on fees," representing fees incurred in the adversary proceeding itself to recover the first two categories of fees; and (4) fees incurred to prosecute bad-faith claims for damages under § 303(i)(2). The 11th Circuit affirmed the first category because neither party challenged the award. The 11th Circuit affirmed the 2nd categories fees incurred to sustain an appeal of a dismissal award under § 303(i)(1) and that the bankruptcy court may award such fees. The 11th Circuit affirmed the 3rd category for "fees on fees". Additionally, the 11th Circuit found that a party may recover its attorneys fees for prosecuting the bad faith under §303(i)(2) at the conclusion of its prosecution. Finally, the 11th Circuit found that the principals and agents of a petitioner creditor may be liable, and in this case were, for attorneys fees.

Molette v. Title Max
(In re Molette)

--- Fed.Appx. ----, 2015 WL 451235 (11th Cir. Feb. 4, 2015)

- Section/Rule/Keywords: Rule 9024; Rule 60; relief judgment

- Summary: A *pro se* Debtor filed for bankruptcy. Post-petition a lender repossessed the Debtor's vehicle, but returned it. Debtor moved for sanctions in the bankruptcy court, including actual and punitive damages. The Bankruptcy Court awarded the debtor actual damages and punitive damages for willfully violating the stay, but denied punitive under 42 U.S.C. § 1983. The Debtor filed a motion under Rule 60 which the Bankruptcy Court denied and the Debtor appealed that order. The District Court affirmed the Bankruptcy Court. The 11th Circuit Affirmed the District Court and found that Rule 60 did not provide the Debtor an opportunity to re-litigate an issue.

District Court Opinions

Kondapalli *v.* Demasi, et. al.
(*In re Demasi*)

Slip Copy, 2015 WL 773393 (M.D. Fla. Feb. 24, 2015) (Covington, J.)

- Section/Rule/Keywords: 28 U.S.C. § 158(a)(3), interlocutory appeal, motion for leave to appeal

- Summary: Defendant sought an interlocutory appeal of bankruptcy court order which dismissed portions of adversary complaint to determine non-dischargeability of, among other things, attorneys' fee dues as the prevailing party in a state court lawsuit. The underlying state court judgment was based on the Debtor's alleges breaches of his duties of care, loyalty, and good faith under Florida Statute Ch. 608. The District Court denied the Defendant's motion for leave to appeal under 28 U.S.C. § 158(a)(3) after analyzing the factors in 28 U.S.C. § 1292(b): (i)whether the order involves a controlling question of law; (ii) there is substantial ground for difference of opinion; and (iii) whether an immediate appeal from the order may materially advance the ultimate termination of the litigation. After noting that leave for an interlocutory appeal should only be granted in exceptional circumstances, the District Court denied the motion for leave to appeal. The District Court found that the instant appeal did not lend it self to resolution of a controlling question of law because it would require a substantial review of the complex facts at issue. Additionally, the Defendant's motion did not sufficiently address the differences in opinion between other courts and the order at issue. Finally, the District Court found that an interlocutory appeal in this instance further would protract the litigation. Accordingly, the District Court denied the Defendant's motion for leave to appeal.

Underwriters v. Taylor, Bean & Whitaker Mortgage Corporation
(*In re* Taylor, Bean & Whitaker Mortgage Corporation)

Slip Copy, 2015 WL 728493 (M.D. Fla. Feb. 19, 2015) (Funk, J.)

- Section/Rule/Keywords: Bond Dishonesty Policy; Insurance

- Summary: In an adversary proceeding which stemmed from the bankruptcy filing of a mortgage company a coverage dispute arose between the Debtor and the underwriters ("Underwriter"). The Underwriter commenced the adversary proceeding to rescind the policy based on misrepresentations. The Debtor counterclaimed for breach of contract based on the Underwriter's refusal to pay out based on insurance policies and bonds for employee dishonesty (the "Bond").

The underlying insurance claim centered on the managing shareholder of the Debtor's misappropriation of approximately $87 million. The District Court found in favor of the Underwriter on the breach of contract count. The District Court held that the Bond did not apply to conduct of the managing shareholder because he did not constitute an "employee" under the Bond, even where his conduct was arguably facilitated by employees.

In re Able Body Temporary Services, Inc.

Slip Copy, 2015 WL 791281 (M.D. Fla. Feb. 25, 2015) (Merryday, J.)

- Section/Rule/Keywords: 11 U.S.C. § 9019; 11 U.S.C. § 363; compromise of controversy

- Summary: Pre-petition debtor sold his interests in several companies to a purchaser. As part of the purchase, the purchaser purportedly agreed to pay debtor a consulting fee for a period of time. Shortly after entering into the agreement the debtor and purchaser engaged in litigation which led to the personal and corporate bankruptcy filings of the debtors. The trustees for the debtors' estates and the purchaser agreed to a settlement and filed a verified motion to approve the settlement. The Bankruptcy Court granted the motion to approve over a creditor's objection and request for discovery and evidentiary hearing. On appeal, the District Court affirmed the Bankruptcy Court's Order granting a motion to approve settlement. The District Court noted that an evidentiary hearing is not always required. Further, the District Court reviewed, among other things, the verified motion, a prior 2004 exam of the purchaser, and representations of counsel to determine there were sufficient facts to support the Bankruptcy Court's analysis of *Justice Oaks*. Additionally, the Court recognized that the creditor had failed to conduct any discovery in the prior 2 years of the bankruptcy. Finally, the District Court found that where claims of the estate are resolved the Bankruptcy Court properly reviewed the requirements of 11 U.S.C. § 363.

JY Creative Holdings, Inc. v. McHale

Slip Copy, 2015 WL 541692 (M.D. Fla. Feb. 10, 2015) (Moody, J.)

- Section/Rule/Keywords: Receivership; authority to file bankruptcy

- Summary: Part owner of a corporation moved to dismiss bankruptcy commenced by a Receiver. Pre-petition a federal District Court appointed the Receiver over

the debtor corporation. The Receivership order provided the Receiver with the powers of the board of directors. The Receiver filed a motion in the District Court for authority to commence a Chapter 11 bankruptcy. Over objection, the motion for authority to file a bankruptcy was granted and a Ch. 11 bankruptcy commenced. The part owner filed a motion to dismiss the bankruptcy on the basis that the Receiver did not receive approval from the board of directors. The Bankruptcy Court denied the motion to dismiss. The District Court affirmed the Bankruptcy Court and found that a bankruptcy court is bound by a district court's prior order appointing a receiver and granting authority to file a bankruptcy. Further, requiring a receiver to obtain permission of the board of directors would undermine the reason to appoint a receiver.

In re Organized Confusion, LLP

Slip Copy, 2015 WL 728223 (M.D. Fla. Feb. 19, 2015) (Bucklew, J.)

- Section/Rule/Keywords: 28 U.S.C. §157(d); withdraw reference

- Summary: Ch. 7 Trustee who commenced 9 adversary proceedings against bank filed a motion to withdraw the reference in 7 of the 9 adversary cases. The adversary proceedings were for, among other things, fraudulent transfer, under § 544 and Fla. Stat. § 726, and unjust enrichment. The plaintiff Trustee filed a motion to withdraw the reference. In making its determination the District Court did not consider whether the causes of action were core or non-core because the Bankruptcy Court had not first made that determination. Additionally, the District Court found that the judicial economy would not be served where the Bankruptcy Court already heard a motion to dismiss. Finally, the District Court found on the factor of whether a jury trial is requested that the pre-petition jury trial waivers signed by several of the debtors are binding on the trustee. Accordingly, the District Court denied the motion to withdraw the reference.

Iberiabank v. Geisen

Slip Copy, 2015 WL 631398 (S.D. Fla. Feb. 13, 2015) (Rosenberg, J.)

- Section/Rule/Keywords: Res Judicata; confirmation; plan

- Summary: Ch. 11 Debtor's confirmed plan included a general release of claims against an individual guarantor. The plan was confirmed. A year after plan confirmation, a lender pursued the guaranty for a loan connected to bankruptcy against the individual guarantor (the "First Loan"). The Bankruptcy Court, District

Court and 11th circuit found that the confirmation order was given res judicata effect and the liability released. Subsequently, the lender filed a motion to reopen the bankruptcy to pursue the guarantor on a loan which did not have a factual relationship to the bankruptcy (the "Second Loan"). In affirming the Bankruptcy Court, the District Court found that the Second Loan was similarly released based on principals of res judicata flowing from the confirmation order. Additionally, the District Court found that even if the confirmation order was ambiguous and did not constitute a res judicata the 11th Circuit decision on the First Loan on ambiguity was binding based on res judicata.

Damerau v. FPH
(In re Damerau)
Slip Copy, 2015 WL 738668 (S.D. Fla. Feb. 24, 2015) (Bloom, J.)

- Section/Rule/Keywords: 28 U.S.C. § 158; leave to appeal

- Summary: Debtor moved *pro se* for leave to appeal order which denied Debtor's motion for an accounting of proceeds from sale of Debtor's purported homestead. At the hearing on the motion for accounting, Debtor's former counsel represented to the Bankruptcy Court that the accounting by the creditor was sufficient. The Bankruptcy Court denied the motion for accounting because the issue was moot based on the accounting provided by the creditor. The District Court denied the motion for leave to appeal. The District Court determined, among other things, that the motion did not present a controlling question of law as the Debtor's former counsel had the ability to bind the Debtor and did so in agreeing to the adequacy of the accounting.

Gould v. Furr
Slip Copy, 2015 WL 846416 (S.D. Fla. Feb. 26, 2015) (Bloom, J.)

- Section/Rule/Keywords: 28 U.S.C. § 157; mandatory withdrawal of reference

- Summary: *Pro se* party-in-interest filed a motion for mandatory withdrawal of the reference on behalf of himself individually and as a former partner of a partnership. The motion to withdraw the reference was filed more than six months after the final substantive proceeding in the bankruptcy case, and eight years after commencement of the bankruptcy case. The District Court denied the motion to withdraw the reference because: (i) it was untimely by not being filed

when non-bankruptcy issues were apparent; and (ii) the motion failed to establish the necessary elements for mandatory withdrawal. Finally, to the the extent the motion was filed on behalf of an entity it was improper because such an entity must be represented by counsel.

Bankruptcy Court Opinions

In re Damerau

--- B.R.---, 2015 WL 738668 (Bankr. S.D. Fla. Feb. 18, 2015) (Olson, J.)

- Section/Rule/Keywords: 28 U.S.C. § 144, 28 U.S.C. § 455, disqualify or recuse bankruptcy judge.

- Summary: A debtor filed a motion to disqualify, with an accompanying affidavit, the bankruptcy judge presiding over his Chapter 7 bankruptcy case. The debtor's motion argued that pursuant to 28 U.S.C. § 144 the bankruptcy judge was required to proceed no further once a timely affidavit was filed. The Bankruptcy Court found that by its terms 28 U.S.C. § 144 applies only to district court judges, not bankruptcy court judges. The remainder of the debtor's motion argued for disqualification based on the Bankruptcy Court's alleged bias under 28 U.S.C. § 455(b)(1) or the appearance of partiality under 28 U.S.C. § 455(a). The Bankruptcy Court denied the portion of the motion based on 28 U.S.C. § 455(b)(1) because the alleged bias must arise from an extrajudicial source, not from the proceeding before the court. Finally, the Bankruptcy Court denied the motion to disqualify based on 28 U.S.C. § 455(a) because even if the Bankruptcy judge criticized debtor's counsel, such criticisms were supported by the record before the Bankruptcy Court.

In re Anna Maria Sanders

Slip Copy, 2015 WL 877499 (Bankr. S.D. Fla. Feb. 26, 2015) (Olson, J.)

- Section/Rule/Keywords: 28 U.S.C. § 144, 28 U.S.C. § 455, disqualify or recuse bankruptcy judge.

- Summary: Debtor filed a motion to dismiss her chapter 11 bankruptcy case. The dismissal motion was granted by an order which retained jurisdiction to review applications of professionals. After reviewing the application of debtor's counsel, the Bankruptcy Court entered an Order which, among other things, granted a

portion of the fees, but did not authorize their payment and set an evidentiary hearing on the applications. Debtor's counsel filed a notice of appeal. Two days after filing the notice of appeal, Debtor's counsel filed a motion to recuse. Accordingly, since the bankruptcy case was closed, the Bankruptcy Court refrained from ruling on the Motion to Recuse in the event it was later determined that the appeal divested the court of jurisdiction.

In re Blackburn

--- B.R. ---, 2015 WL 674686 (Bankr. N.D. Fla. Feb 3, 2015) (Specie, J.)

Section/Rule/Keywords: 11 U.S.C. § 506(d); 26 U.S.C. § 6321; strip off, strip down, IRS lien

- Summary: Debtor filed motion to determine secured status and to strip off junior liens on a piece of real property. The value of the real property was less than the value of the first mortgage. However, the Debtor had equity in his personal property. The IRS held a junior lien on the real property. The IRS objected to the Debtor's motion on the basis that the IRS lien under 26 U.S.C. § 6321 provides for an indivisible lien on all of the Debtor's real and personal property. The Bankruptcy Court sustained the IRS objection and found that 26 U.S.C. § 6321 creates an indivisible lien on all property. Accordingly, because the IRS' lien was supported by equity in the Debtor's personal property under *Dewsnup v. Timm,* 502 U.S. 410 (1992) the motion to value constituted an impermissible attempt to strip down rather than a strip off of an entirely unsecured lien.

Bender v. James
(In re Hintze)

---B.R.---, 2015 WL 604152 (Bankr. N.D. Fla. Feb. 11, 2015) (Specie, J.)

- Section/Rule/Keywords: 11 U.S.C. § 544, Fla. Stat. § 679.2031, description of collateral, trustee status as judgment creditor

- Summary Chapter 7 Trustee commenced an adversary proceeding to determine whether a Creditor held a secured interest on all of the debtor's assets. The pre-petition agreement between the debtor and creditor provides that Creditor's collateral is "all of Maker's assets." The Bankruptcy Court found the description of collateral to be inadequate under Fla. Stat. § 679.2031. The

Creditor argued that the Trustee was estopped or waived making an argument regarding the description because the Trustee steps into the shoes of the debtor. The Bankruptcy Court rejected the Creditor's arguments on the basis that 11 U.S.C. § 544 provides the Trustee with the status of a judgment creditor with different rights than the debtor. Accordingly, the Bankruptcy Court found that the Trustee could challenge the Creditor's secured status and the security agreement was insufficient to grant a security interest.

In re Callejo

Slip Copy, 2015 WL 779002 (Bankr. S.D. Fla. Feb. 23, 2015) (Cristol, J.)

- Section/Rule/Keywords: Fla. Const. Art. X, § 4(a)(1); Fla. Stat. §§ 222.01 & 222.02; exemptions; homestead

- Summary: Chapter 7 Trustee objected to exemptions of Debtors' who claimed their residence exempt under the Florida homestead exemption. The Debtors resided in the real property continuously for over ten years. The Debtors provided and charged for tutoring services provided at the residence. The Trustee sought to limit the claimed homestead exemption on the basis that portions of the home were used for commercial purposes. The Bankruptcy Court ruled in favor of the Debtors. The Bankruptcy Court distinguished the present case, in which the homestead was one structure, from other cases which limited that homestead where commercial activity occurred in a separate structure on the same parcel. Further, the Bankruptcy Court noted that other courts have found that Florida's homestead laws limits the protection to the residence, but does not limit the activities the owner can engage therein.

In re Doherty

Slip Copy, 2015 WL 631335 (Bankr. M.D. Fla. Feb. 10, 2015) (Glenn, J.)

- Section/Rule/Keywords: 11 U.S.C. § 1329; Modify Confirmed Chapter 13 Plan

- Summary: Ch. 13 Trustee filed a motion under 11 U.S.C. § 1329(a) to modify the Debtors' confirmed Ch. 13 plan. Due to the doctrine of *res judicata* which applies to a confirmed plan, the Trustee was required to show that the Debtors' circumstances have substantially and unexpectedly changed. The Chapter 13 Trustee argued that two reasons justified a modification: (i) Debtors' capital gains

on their tax return, from the sale of building, constituted disposable income; and (ii) Debtors' receipt of a tax refund constituted disposable income. The Bankruptcy Court found that the capital gain from the sale of a building did not constitute disposal income where the Debtors did not receive a distribution from the sale, such proceeds going to the secured lender. Additionally, the Bankruptcy Court held that while generally tax refunds are subject to administration, in this case where the Debtors' tax return reflected income below their amended statement of income, the tax refund did not constitute disposable income. Accordingly, the Bankruptcy Court denied the Trustee's motion to modify the Ch. 13 plan.

Gonzon v. Bank of New York Mellon (*In re Gonzon*)

Slip Copy, 2015 WL 535482 (Bankr. S.D. Fla. Feb. 5, 2015) (Mark, J.)

- Section/Rule/Keywords: 11 U.S.C. § 506; strip off; IRS Lien.

- Summary: The Debtor filed a motion for partial summary judgment to strip off a wholly unsecured junior lien held by the IRS on the Debtor's home. The IRS objected to the Debtor's attempt to strip off the lien on the basis that the IRS lien is secured by both the Debtor's real and personal property, which the IRS argues has value. The Bankruptcy Court found that even if the IRS lien is supported by value in the personal property that does also not mean the lien is partially secured by the home. Accordingly, the Bankruptcy Court allowed the Debtor to extinguish the IRS lien on his home.

Florida State Court Opinions

Ammed Surgical Equipment, LLC v. Professional Medical Billing

40 Fla. L. Weekly D352, 2015 WL 489744 (Fla. 2d DCA Feb. 6, 2015)

- Section/Rule/Keywords: 11 U.S.C. § 362; 11 U.S.C. § 108; Tolling; Automatic Stay; Appeal.

- Summary: State Court entered an injunction order against a Defendant. Before the 30 day deadline to appeal the injunction order, the Defendant filed for

bankruptcy. The Defendant sought stay relief to file a notice of appeal of the injunction order and the Bankruptcy Court granted stay relief. Thereafter, the Defendant filed the notice of appeal. The 2d DCA found that under the Supremacy Clause of the Constitution, sections 108 and 362 stay and toll the 30 day deadline under Fla. R. App. P. 9.130 if the party files for bankruptcy before expiration of the deadline. Accordingly, the 2d DCA found that the notice of appeal, which was filed more than 70 days after rendition of the order, was timely.