Florida Bankruptcy Case Law Update

July 2014 Cases

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Eleventh Circuit Opinions

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

---Fed. Appx.---, 2014 WL 3586261 (11th Cir. July 22, 2014)

- Section/Rule/Keywords: 28 U.S.C. § 1334, appellate jurisdiction

- Summary: Debtors appealed district court's affirmance of bankruptcy court's orders abstaining from hearing their adversary proceeding and voluntarily dismissing their bankruptcy case. Finding no merit in any of their contentions, the court affirmed, explaining section 1334(d) provides that any decision to abstain or not to abstain is not reviewable by appeal or otherwise by the court of appeals. Accordingly, the Eleventh Circuit lacked jurisdiction to consider this issue. Even if jurisdiction existed, the court found that the bankruptcy court did not use threatening or manipulative language, did not act in a coercive manner, and properly dismissed the chapter 13 case.

Stuart v. Mendenhall (In re Mendenhall)

---Fed. Appx.---, 2014 WL 3586515 (11th Cir. July 22, 2014)

- Section/Rule/Keywords: Fed. R. Bankr. P. 4007(c), dischargeability, timeliness

- Summary: In individual chapter 7 case, bankruptcy court granted sixty-day extension to file dischargeability complaint upon creditor's motion; but order granting extension was vague as a consequence of "poor draftsmanship" as to whether extension ran from original deadline or date of order. After creditor filed dischargeability complaint, debtor moved to dismiss the complaint as untimely. In

the creditor's brief on the issue, the creditor included a request for an extension nunc pro tunc of the expired deadline. The bankruptcy court concluded that dismissal was appropriate because the complaint was untimely: the extension granted ran from the original deadline in which to object to discharge because, among other things, neither the creditor nor the debtor sought clarification of the ambiguity and the deadline could not be extended once it had expired, despite the ambiguity in the order granting the previous extension. The district court affirmed. On appeal, the Eleventh Circuit affirmed the bankruptcy court, explaining that the relevant bankruptcy rules cannot be interpreted to permit extension of time to file a dischargeability complaint under Rule 4007(c) when the motion is made after the time for seeking it has already expired.

Crawford v. LVNV Funding, LLC

---F.3d---, 2014 WL 3361226 (11th Cir. July 10, 2014)

- Section/Rule/Keywords: Fair Debt Collection Practices Act, Fed. R. Bankr. P. 3001(f), 11 U.S.C. § 502

- Summary: In chapter 13 cases, creditor filed its proofs of claim based on a debt, the collection of which was time-barred because the limitations period expired four years earlier. In response, the debtors filed adversary proceedings against the creditor alleging violations of the Fair Debt Collection Practices Act (FDCPA). The bankruptcy court dismissed the adversary proceedings, and the district court affirmed. On appeal, the Eleventh Circuit reversed, holding that a debt collector's filing of a time-barred proof of claim created the misleading impression to the debtor that the debt collector can legally enforce the debt. The Eleventh Circuit remanded for further proceedings because the creditor's alleged conduct, as pled by the debtors, violated the plain language of the FDCPA as a false, deceptive, or misleading representation used in connection with the collection of debt.

Coquina Investments v. TD Bank, N.A.

---F.3d---, 2014 WL 3720301 (11th Cir. July 29, 2014) (Anderson, J.)

- Section/Rule/Keywords: Fifth Amendment, right to silence, adverse inference, Ponzi scheme, damages

- Summary: Defendant bank appealed a jury verdict for fraud arguing that the trial court improperly permitted a nonparty to be called to testify even though the nonparty had decided to invoke his Fifth Amendment privilege, and improperly instructed the jury that it could draw an adverse inference from the nonparty's

silence. The Eleventh Circuit determined that the admissibility of a nonparty's invocation of his Fifth Amendment right to silence and the affiliated drawing of an adverse inference should be considered on a case-by-case basis; four non-exclusive factors should be considered in making such a determination: (1) the nature of the relevant relationships; (2) the degree of control of the party over the nonparty witness; (3) the compatibility of the interests of the party and nonparty witness in the outcome of the litigation; and (4) the role of the nonparty witness in the litigation. The Eleventh Circuit cautioned that these factors should be applied flexibly and that the overarching concern is whether the adverse inference is trustworthy under all of the circumstances. Based on these factors and all of the circumstances, the Eleventh Circuit held that it was appropriate for the trial court to allow the nonparty to testify. Accordingly, the plaintiff investment firm could recover damages from the defendant bank for the bank's role in a Ponzi scheme, and the recoverable damages includes amounts paid to trustee in settlement of preference claims.

District Court Opinions

Burnstein-Burkley, P.C. v. Chaney

2013 WL 3417522 (M.D. Fla. July 14, 2014) (Moody, J.)

- Section/Rule/Keywords: 11 U.S.C. § 503(b); attorney fees; property of the estate

- Summary: Debtor hired law firm pre-petition to pursue recovery of a vintage 1960 Corvette. Law firm filed replevin action in Pennsylvania. Debtor then filed bankruptcy but did not tell law firm, neither did debtor disclose the replevin action on his schedules. Trustee eventually learned of debtor's interest in the vehicle and sold that interest for $25,000. Law firm sought recovery of $111,783.26 in post-petition fees and expenses. District court affirmed bankruptcy court's denial of fees explaining when debtor filed bankruptcy, the interest in the vehicle became estate property. Law firm's services were not necessary to preserve the estate's claim to the Corvette.

U.S. v. Deluca

2014 WL 3341345 (M.D. Fla. July 8, 2014) (Antoon, J.)

- Section/Rule/Keywords: Attorney-Client Privilege

- Summary: Defendant moved to dismiss the indictment against him because of a violation of attorney-client privilege. The Government offered Delco and defendant, who was the president and sole shareholder of Delco, a proposed agreement where either defendant or Delco could assert whether documents obtained by the Government were subject to attorney-client privilege. If privilege was asserted, the prosecution would then not review the questioned documents unless a Magistrate ruled they were not privileged. Defendant signed the document, but Delco's bankruptcy trustee waived all privilege arguments. The U.S. Attorney never signed the stipulation, but acted as if it were in effect.

  The Government reviewed documents Defendant considered privileged because Delco had waived their rights and the Government thought that the waiver extended to Defendant as well. The district court ruled that while the trustee could waive Delco's privilege, it could not waive Defendant's. However, dismissal was ruled to be inappropriate because there was no prejudice or harm to the Defendant. As a remedy, the district court required the evidence to be suppressed in the future.

Alvarez v. Bank of America Corp.

2014 WL 3767669 (S.D. Fla. July 31, 2014) (Marra, J.)

- Section/Rule/Keywords: Emergency Economic Stabilization Act of 2008 ("EESA"), American Recovery and Reinvestment Act of 2009, 12 U.S.C. 5201, Home Affordable Modification Program ("HAMP"), Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201), Mortgage

- Summary: Plaintiff entered into a mortgage, of which the debt was discharged in bankruptcy in 2008. In 2011, defendant purchased the right to foreclose on the property from the original lender. Plaintiff alleged that he was a third party beneficiary to a contract between the defendant and the Treasury Department, and defendant was required to offer a loan modification pursuant to the EESA, the American Recovery Reinvestment Act of 2009, and HAMP. However, there is no private action under the EESA or HAMP, and there was no independent contract for the plaintiff to proceed under. Additionally, plaintiff failed to show a causal connection as required under FDUPTA. Plaintiff's claims were dismissed without prejudice, and plaintiff was granted leave to amend.

Martin v. Butler & Hosch, P.A.

2014 WL 3593622 (M.D. Fla. July 18, 2014) (Bucklew, J.)

- Section/Rule/Keywords: Debt Collection, Florida's Consumer Collection Practices Act ("FCCPA"), Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, Fla. Stat. § 559.72(9)

- Summary: Plaintiff alleged that defendant attempted to unlawfully collect debt because of a faulty debt collection letter in violation of FCCPA and FDCPA. The district court denied defendant's motion to dismiss because the defendant's letter was misleading and failed to state that only the defendant could assume the debt to be valid if plaintiff did not respond within 30 days, in violation of FDCPA and FCCPA. The district court also stated that substituting the word "valid" for "owed" does not violate FDCPA.

Mortgage Now, Inc. v. Stone

2014 WL 3633199 (N.D. Fla. July 23, 2014) (Rodgers, J.)

- Section/Rule/Keywords: Attorneys' fees, F.S.A. § 768.79, offer of judgment

- Summary: Plaintiff served defendant a demand for judgment for $100,000. Defendant did not respond. After a bench trial, plaintiff was awarded $339,468.97. Defendant asserted plaintiff was not entitled to attorneys' fees under F.S.A. § 768.79 because the demand did not state whether attorneys' fees were included in the claim, did not state with particularity the amount offered to settle a punitive damages claim, included a claim for equitable relief, and misidentified the defendant. However, offers that do not explicitly exclude attorneys' fees or punitive damages are assumed to include them, the equitable relief requested was granted prior to the serving of the demand and therefore was not part of the demand, and defendant was aware that the demand was intended for them. The district court adopted the magistrate's Report and Recommendations, granting plaintiff's motion for attorneys' fees, granting plaintiff's motion for extension of time to file its bill of costs, and denying defendant's motion to modify the Clerk's taxation of costs.

Bankruptcy Court Opinions

Bakst v. Smokemist, Inc. (In re Gladstone)

513 B.R. 149 (Bankr. S.D. Fla. July 7, 2014) (Kimball, J.)

- Section/Rule/Keywords: 28 U.S.C. § 1334, 28 U.S.C. § 157, jurisdiction

- Summary: Bankruptcy court concluded that it had statutory power to enter final orders and judgment in this case and that doing so did not involve exercise of the judicial power of the United States under Article III. Court supported this conclusion, explaining determination of property of the estate is a matter that can only arise in a title 11 case, turnover under 11 U.S.C. § 542 is a cause of action specifically provided for in the Bankruptcy Code, substantive consolidation is a proceeding "arising in" a case under title 11 because it is available only in bankruptcy, and seeking an accounting is integral to identification of estate property and thus a proceeding "arising in" a case under title 11.

Lashinsky v. Lashinsky (In re Laskinsky)

2014 WL 3337467 (Bankr. M.D. Fla. July 7, 2014) (Glenn, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(15), Fed. R. Bankr. P. 4007(c), compromise

- Summary: Debtor and plaintiff were divorced. Their final judgment of dissolution of marriage provided for debtor to repay plaintiff the sum of $75,000.00 that debtor borrowed from plaintiff to purchase certain residential property. Because the debt was incurred in the court of the parties' divorce or divorce decree within the meaning of section 523(a)(15), it was not dischargeable in debtor's bankruptcy case. Additionally, despite the debtor's argument otherwise, the plaintiff's claims were not satisfied by a compromise between the bankruptcy trustee and the plaintiff.

In re Falck

513 B.R. 617 (Bankr. S.D. Fla. July 25, 2014) (Olson, J.)

- Section/Rule/Keywords: Contempt, sanctions, Fed. R. Bankr. P. 9023, Fed. R. Civ. P. 59

- Summary: Debtor placed in custody of United States Marshal for sole purpose of coercing him to pay $35,400 in fines, penalties, and sanctions based on contempt of court. Debtor's spouse sent a letter to chambers asking to get the debtor out on bond and to let him arrange a payment plan. Treating the letter as a Motion for Amendment of Civil Contempt Order, the bankruptcy court held that because the civil contempt sanction imposed on the debtor is coercive in nature, and because it has no connection to any criminal proceeding, the concept of release upon posting of a bond is inapposite. However, the bankruptcy court agreed to consider modification of the Contempt Order, release of the debtor from the custody of the United States Marshal, and/or a payment plan upon a proper evidentiary showing of inability to pay.

Corn v. Wolfe (In re Rodriguez)

513 B.R. 767 (Bankr. S.D. Fla. July 30, 2014) (Ray, J.)

- Section/Rule/Keywords: 28 U.S.C. § 158(d)(2)(A)(iii), Fed. R. Bankr. P. 8001(f), direct appeal

- Summary: The bankruptcy court concluded that circumstances of the case warranted a direct appeal to the Eleventh Circuit and doing so serves the interest of judicial economy because it would allow the debtor to avoid attorney's fees, costs, and time associated with another appeal to the district court on a substantively identical issue that is already pending before the Eleventh Circuit. Moreover, direct appeal to the Eleventh Circuit would help all parties avoid protracted litigation and would greatly expedite final resolution of this case. Because certification would materially advance the progress of this case, the bankruptcy court determined it is appropriate to certify a direct appeal.

In re Savilonis

2014 WL 3361986 (Bankr. M.D. Fla. July 9, 2014) (Funk, J.)

- Section/Rule/Keywords: 11 U.S.C. § 1329, plan modification, change in circumstances

- Summary: Chapter 13 debtor sought to modify his plan post-confirmation to decrease payments by $1,678 per month on the basis that he incurred unanticipated medical expenses and experienced increased expenses related to his nondependent son. The bankruptcy court denied the debtor's motion to amend. The court determined that the debtor's conduct related to providing financial support to his adult nondependent son, does not constitute a

substantial, unanticipated change in circumstances. The court further determined that the debtor did not provide evidence of necessary medical expenses to justify a reduction in plan payments by $1,678 per month.

In re 2408 W. Kennedy, LLC

512 B.R. 708 (Bankr. M.D. Fla. July 1, 2014) (Williamson, J.)

- Section/Rule/Keywords: 11 U.S.C. § 365, relief from automatic stay, lease assumption, lease termination

- Summary: Landlord moved for stay relief in order to conclude prepetition eviction proceedings against chapter 11 debtor because debtor's lease was terminated by a default notice from landlord and by entry of a final judgment of possession and a writ of possession obtained prepetition. The bankruptcy court determined that neither a final judgment for possession nor a writ of possession terminates a lease under Florida law. Rather, until the writ of possession is executed and the tenant removed from the premises, the tenant has the right to retain possession of the leased premises. The court further determined that landlord failed to establish Debtor's default, therefore, the notice did not terminate debtor's lease. Thus, the debtor had a leasehold interest in the premises and a potential right to assume the lease.

In re Michaud

2014 WL 3362157 (Bankr. M.D. Fla. July 9, 2014) (May, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(8), undue hardship, *Brunner* test

- Summary: Debtor moved to discharge student loan debt as an undue hardship under 11 U.S.C. § 523(a)(8). The bankruptcy court applied the *Brunner* test and determined that the debt is non-dischargeable. The court determined that debtor's income was nearly twice the poverty level, debtor had no dependents, debtor made almost all of his scheduled student loan payments, and that there was various repayment plans in which the debtor could participate to lower his monthly payment. Therefore, the court ruled that the debtor did not prove that the student loan debt imposed an undue hardship.

Antaramian Props., LLC v. Basil St. Partners, LLC (In re Basil St. Partners, LLC)

2014 WL 3563227 (Bankr. M.D. Fla. July 18, 2014) (Delano, J.)

- Section/Rule/Keywords: attorney's fees, prevailing party, fee allocation

- Summary: Defendants were the prevailing party in an adversary proceeding based on plaintiff's claim of breach of guaranty and the guaranty was held to be unenforceable. Plaintiff was the prevailing party on defendants' fraud-based counterclaims. The bankruptcy court entered an Order Granting in Part Defendants' Motion for Attorney's Fees. At the evidentiary hearing to determine the amount of the attorney's fees, plaintiff argued that defendants were limited to recovery of attorney's fees incurred in connection with the affirmative defenses and counterclaims on which they prevailed because defendants did not allocate the fees incurred between their successful and unsuccessful defenses and counterclaim. The court determined that under Florida law a prevailing defendant who successfully defeats a plaintiff's claim is entitled to recover all of its attorney's fees in defense of the plaintiff's claim, even if some of the defenses were not successful. The court further concluded that while generally a plaintiff seeking recovery of all of its attorney's fees must demonstrate that the successful and unsuccessful claims are inextricably intertwined, in this case the fraud-based counterclaims, while not inextricably intertwined with defendants' successful claims, were identical to the fraud-based affirmative defenses. Therefore, the court held that the defendants should not be subject to an artificial distinction between their defenses and counterclaims and held that defendants were not required to allocate their fees.

Abdullah M. Al-Rayes v. Willingham (In re Willingham)

2014 WL 3697556 (Bankr. M.D. Fla. July 18, 2014) (Funk, J.)

- Section/Rule/Keywords: Judicial notice, Fed. R. Civ. P. 201(b), Fed. R. Civ. P. 30(b)(6)

- Summary: Defendant moved the bankruptcy court to take judicial notice of the corporate structure of plaintiff and to compel the deposition of the managing agent of plaintiff who resided out of the country. The court determined that it may take judicial notice of records from the State of Florida, Division of Corporations and State of Georgia Division of Corporations under Rule 201(b) of the Federal Rules of Civil Procedure. The court further concluded that Rule 30(b)(6) of the Federal Rules of Civil Procedure permits a party to depose a public or private corporation, a partnership, an association, a governmental agency or other entity, and a party who wishes to take the deposition of a specific officer or agent of the corporation may obtain it and is not required to allow the corporation to decide whose testimony the other party may have. Therefore, the court determined that

the defendant was permitted to take the deposition of the out of country managing agent of the plaintiff and concluded that a deposition by video-conference was the appropriate location for such a deposition.

In re Alexander

2014 WL 3672135 (Bankr. M.D. Fla. July 23, 2014) (Funk, J.)

- Section/Rule/Keywords: 11 U.S.C. § 506, 11 U.S.C. § 1322(b)(2), wholly unsecured, property valuation, strip off

- Summary: Debtors filed a complaint to strip off their second mortgage lien, have the lien voided and the claim declared wholly unsecured. At trial, competing experts testified as to the value of the property. The court performed a lengthy analysis of the adjustments made by each expert to the sales comparables to determine the value of the property. The court found that the value of the property was less than the amount of the first mortgage and, therefore, the second mortgage is wholly unsecured, not subject to 11 U.S.C. § 1322(b)(2)'s anti-modification provision and can be stripped off.

In re Court

2014 WL 3400521, (Bankr. M.D. Fla. July 11, 2014) (Glenn, J.)

- Section/Rule/Keywords: Homestead, equitable Lien, fraud, egregious conduct, Article X, section 4(a)(1) of the Florida Constitution, constructive trust, exemption

- Summary: Debtor claimed residence as exempt homestead pursuant to Article X, §4 of the Florida Constitution. Plaintiff objected to the exemption, alleging that part of the homestead was subject to an equitable lien or constructive trust. Debtor had signed a note allowing her to borrow up to $350,000 from a trust to fund the construction of her homestead. Ultimately, debtor borrowed over $580,000 from the trust. Plaintiff alleged that the debtor did not have the authority to exceed the $350,000 amount, and any funds taken over that amount were obtained through fraud or egregious conduct, and were therefore subject to either an equitable lien or constructive trust. However, the evidence did not clearly show that the withdrawals were misrepresented to the trust and did not prove fraud or egregious conduct by the high standard required for an exception to Florida homestead exemption, and the homestead was therefore exempt.

In re Basil Street Partners, LLC.

2014 WL 3582710 (Bankr. M.D. Fla. July 18, 2014) (Delano, J.)

- Section/Rule/Keywords: Motion in Limine, Attorneys' Fees

- Summary: Defendants filed a Motion in Limine to exclude plaintiff's expert's testimony concerning attorneys' fees. Plaintiff had objected to defendants' entitlement to fees for unsuccessful counterclaims and affirmative defenses, instead believing defendants were only entitled to the attorneys' fees that were associated with those that were successful. Plaintiff's expert ran a proprietary software sorting program which separated defendants' attorneys' fees into categories in order to determine if they were associated with the successful counterclaims and affirmative defenses or not. The court ruled that the expert's testimony was not credible because the testimony was not based on sufficient facts or data, was not the product of reliable principles or methods, and did not reliably apply the principles and methods to the facts in the case. The expert had not been involved with the previous litigation, was unfamiliar with the claims and defenses, did not detail how his program worked, and ran the software search based on key words provided solely by the plaintiff.

In re Basil Street Partners, LLC.

2014 WL 3567628 (Bankr. M.D. Fla. July 18, 2014) (Delano, J.)

- Section/Rule/Keywords: Successor-in-interests, assignee, confirmed plan

- Summary: This removed action involved a dispute between two corporations over control and voting rights for a resort complex previously owned by the debtor. Plaintiff asserted that the defendant did not have control of the complex and could not assert the voting privileges previously held by the debtor. Under the express terms of debtor's confirmed plan, the defendant was not a successor-in-interest. However, this did not preclude the defendant from being the debtor's assignee. An assignee acquires rights and interests in property, while a successor-in-interest also acquires obligations and liabilities. As assignee, defendant acquired control of debtor's previous interests, and therefore acquired the developer status and the associated voting privileges previously held by the debtor.