Florida Bankruptcy Case Law Update

September 2014 Cases

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Eleventh Circuit Opinions

In re Ernie Haire Ford, Inc.

---F.3d---, 2014 WL 4358417 (11th Cir. Sept. 4, 2014)

- Section/Rule/Keywords: standing to appeal, "person aggrieved"

- Summary: An adversary defendant appealed from a bankruptcy court order granting the debtor's motions to modify the second amended and restated chapter 11 plan and confirming the debtor's third amended plan of reorganization. The second amended plan had set a litigation bar date by which all litigation had to be commenced or be conclusively deemed waived or abandoned. The second plan also allowed the bankruptcy court to enjoin any person from commencing a suit barred by the plan. After the litigation bar date had expired, the liquidating agent sued the appellant in an adversary proceeding alleging fraud and misappropriation. The debtor filed a motion to modify the second plan to extend the litigation bar date. The bankruptcy court granted the motion and the debtor subsequently filed a third plan which modified the litigation bar date to allow the adversary proceeding against the appellant to go forward. The Eleventh Circuit found that the appellant's interest in avoiding liability is not an interest protected or regulated by the Bankruptcy Code and appellant is therefore not "aggrieved" for the purposes of appealing the order.

In re Nemcik

---Fed.Appx.---, 2014 WL 4336366 (11th Cir. Sept. 3, 2014)

- Section/Rule/Keywords: 11 U.S.C. § 506(d), lien stripping, strip off

- Summary: Bank appealed from a bankruptcy court order voiding the bank's junior lien on the debtor's real property in a chapter 7 bankruptcy proceeding. The debt owed on the first mortgage exceeded the fair market value of the property. Because the bank's junior lien was considered to be wholly "underwater", the bankruptcy court allowed the debtor to strip off or void the bank's lien. The bank argued that, in light of the Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), the court should not permit a chapter 7 debtor to strip off a creditor's lien on real property where the value of the property is less than what is due to be paid to the creditor. The Eleventh Circuit stated it was bound by its precedent in *McNeal v. GMAC Mortg., LLC*, 735 F.3d 1263 (11th Cir. 2012) per curium), which was rendered after the *Dewsnup* decision, and affirmed the bankruptcy court's order.

  Nearly identical decisions were rendered in the cases of *In re Phillips*, ---Fed.Appx.---, 2014 WL 4802755 (11th Cir. Sept. 29, 2014); *In re Iest*, ---Fed.Appx.---, 2014 WL 4825253 (11th Cir. Sept. 30, 2014).

In re Bifani

---Fed. Appx.---, 2014 WL 4457144 (11th Cir. Sept. 11, 2014)

- Section/Rule/Keywords: Fla. Stat. § 726.105, FUFTA, homestead

- Summary: This case involved an appeal from a bankruptcy court decision granting summary judgment under Florida's Uniform Fraudulent Transfer Act imposing an equitable lien on the defendant's homestead property. The defendant argued that questions of fraud are fact specific and the bankruptcy court erred by granting summary judgment. The Eleventh Circuit found that the bankruptcy court had correctly determined, (a) that the defendant was the "functional equivalent" of an insider, based on her long term relationship and cohabitation with the debtor; (b) the debtor continued to exercise control over the property; (c) the timing of the transfer from the debtor to the defendant was suspect; and (d) the defendant provided no consideration in exchange for the deeds. These factors constituted four "badges of fraud" and established a *prima facie* case. Because the defendant presented no evidence to the contrary, summary judgment was proper. Funds from the fraudulent transfers were used to purchase the homestead property and, under Florida law, the homestead property is not exempt from equitable liens.

District Court Opinions

Scharrer v. Troutman Sanders, LLP
(In re Fundamental Long Term Care)

2014 WL 4452711 (M.D. Fla. Sept. 9, 2014) (Kovachevich, J.)

- Section/Rule/Keywords: 28 U.S.C. § 157(d), permissive withdrawal of reference

- Summary: Defendant sought an immediate withdrawal of reference from the bankruptcy court to the district court (1) because the plaintiffs' claims are non-core; (2) to allow the district court to become familiar with the proceedings, and (3) because the plaintiffs have demanded a jury trial. The district court found that allowing adversary proceedings to continue in bankruptcy court for pretrial matters advanced the court's interest in uniformity of administration of bankruptcy cases. Because the litigation had been pending for two and a half years, the bankruptcy court was already familiar with the case. Therefore, keeping pretrial matters before the bankruptcy court promoted efficient use of judicial resources. Finally, allowing the bankruptcy court to resolve pretrial issues and enter findings of fact and recommendations of law on dispositive issues is consistent with Congress' intent to let bankruptcy judges determine bankruptcy matters to the greatest extent possible. Accordingly, the motion to withdraw reference was denied without prejudice to re-file at the time of trial.

Farmers & Merchants State Bank v. Turner

---B.R.----, 2014 WL 4924955 (N.D. Fla. Sept. 30, 2014) (Rodgers, J.)

- Section/Rule/Keywords: 11 U.S.C. § 303, involuntary bankruptcy, bona fide dispute

- Summary: A bank appealed an order of dismissal of an involuntary chapter 7 bankruptcy proceeding brought against the guarantor of certain loans made to companies owned by the guarantor. The bank and two other creditors had commenced an involuntary chapter 7 proceeding against the guarantor. The borrowing companies had merged into a single entity and that entity had filed a chapter 11 case. Each of the creditors had participated in that chapter 11 case and a reorganization plan was confirmed. Pursuant to that plan the creditors received stock in the reorganized entity. The guarantor claimed that he was

entitled to credits against the debts claimed and, therefore, there was a bona fide dispute as to the amount owed to the bank and the other petitioning creditors. The district court agreed and found that, because there was a bona fide dispute as to the amount of the claims asserted by the creditors, the petitioners were ineligible to file the involuntary petition.

Rosenberg v. DVA Receivables, XIV, LLC

---B.R.---, 2014 WL 4810348 (S.D. Fla. Sept. 29, 2014) (Altonaga, J.)

- Section/Rule/Keywords: 11 U.S.C. § 303, involuntary bankruptcy, bad faith

- Summary: The district court considered a Rule 50(b) motion for judgment as a matter of law, following a jury trial awarding plaintiff compensatory and punitive damages based upon the defendants' filing of an involuntary bankruptcy petition against plaintiff in bad faith. The defendants claim that they relied on advice of counsel in instituting the involuntary bankruptcy. The court determined that in light of the jury verdict against them, they could only prevail on their motion if the jury could not have concluded that the defendants had an improper purpose in filing the involuntary bankruptcy. The defendants could not meet this burden. With respect to the punitive damage award, the court observed that a finding of bad faith does not equate to a finding of intentional malice or that the conduct was particularly egregious or reprehensible. Because the record was bereft of any maliciousness, intentional deception or egregious conduct, the court set aside the award of punitive damages. With respect to the award of lost wages or reputational harm, the court determined that the plaintiff had to establish that with "reasonable certainty" the bad faith involuntary filing produced or contributed to the harm alleged. The court found insufficient evidence to support those awards.

West v. Chrisman

---B.R.---, 2014 WL 4683182 (M.D. Fla. Sept. 19, 2014) (Honeywell, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(2) and (a)(4), fraud, defalcation, nondischargeability

- Summary: In this case, the court held that the plaintiff, the personal representative of an estate and co-trustee of a decedent's trust, was entitled to recover attorneys' fees paid to an attorney/debtor for services he rendered to the estate and trust prior to bankruptcy. The bankruptcy court concluded that the

attorney had made fraudulent representations in violation of his fiduciary duties. The bankruptcy court found that the debtor/attorney was liable to the plaintiff for a sum in excess of $212,000 and that the debt was nondischargeable under both §§ 523(a)(2) and (a)(4). The district court affirmed.

Lorenzo v. Wells Fargo (In re Lorenzo)

---B.R.----, 2014 WL 4722755 (S.D. Fla. Sept. 23, 2014) (Marra, J.)

- Section/Rule/Keywords: 11 U.S.C. § 727, Rule 9006, Rule 7055, discharge, default, failure to keep records, excusable neglect

- Summary: The bank filed an adversary complaint against a chapter 7 debtor arguing that, pursuant to § 727(a)(3), the debtor was not entitled to a discharge because the debtor had destroyed most of the records of two companies she owned and a computer server and gave false testimony concerning her assets. Three days after the responsive pleading was due, the bank moved for default. Three days later the debtor's counsel filed a motion for extension of time to respond to the complaint. The motion for extension was denied by the bankruptcy court finding that the debtor had not demonstrated excusable neglect and entered a default in favor of the bank. The debtor then moved to vacate the default and that motion was denied. The district court agreed with the bankruptcy court that the debtor had failed to meet the less stringent test under Rule 9055, Fed. R. Bankr. P., with respect to vacating a default. In addition, the district court found that the well pled allegations to the complaint, deemed admitted by virtue of the default, established the necessary elements of the nondischargeability claim. Accordingly, the debtor was not entitled to a discharge under 11 U.S.C. § 727(a)(3).

Kahama VI, LLC v. HJH, LLC

Slip Copy, 2014 WL 4655741 (M.D. Fla. Sept. 17, 2014) (Moody, J.)

- Section/Rule/Keywords: Fla. Stat. § 726.108, fraudulent transfer, mere conduit

- Summary: Plaintiff filed actions to collect on a note and foreclose a mortgage. In its amended complaint, plaintiff added the attorney for the borrower as a defendant, alleging a fraudulent transfer claim. The borrower had asserted a claim against a title insurance company. Pursuant to a settlement, the title

insurance company had wired $100,000 into the trust account of the attorney for borrower. The attorney retained $30,000 for his attorneys' fees and costs associated with his representation of borrower and disbursed $50,000 to borrower and $16,000 to others as directed. The attorney moved for summary judgment on the fraudulent transfer claim. The district court distinguished this case from the *In re Harwell*, 628 F.3d 1312 (11th Cir. 2010) decision, in which a bankruptcy court had found an attorney liable for funds held in his trust account, because, in *Harwell*, the attorney had actively participated in the fraud. In this case, the district court found that the attorney had shown sufficient facts to show that he and his firm were a "mere conduit" of the settlement funds and were therefore, not liable for a fraudulent transfer.

Bankruptcy Court Opinions

In re Martinez

515 B.R. 383 (Bankr. S.D. Fla. Sept. 11, 2014) (Mark, J.)

- Section/Rule/Keywords: 11 U.S.C. § 105, 11 U.S.C. § 362(c), automatic stay

- Summary: A debtor, whose prior bankruptcy had been dismissed for failure to confirm a plan, filed a second bankruptcy. Pursuant to § 362(c)(3), the debtor had 30 days to complete a hearing on a motion to extend the automatic bankruptcy stay. The debtor waited until the evening of the 30th day to file the motion to extend the automatic stay, making it impossible to schedule a hearing before the statutory period expired. The debtor argued that the bankruptcy court could extend the stay pursuant to the authority granted to it under § 105 of the Code. The court denied the motion finding that it could not use § 105 to extend the clear statutory deadline, finding that to do so would be directly contrary to the clear text of § 362(c)(3)(A) and § 362(c)(3)(B).

In re Ruiz

515 B.R. 362 (Bankr. M.D. Fla. Sept. 5, 2014) (Jennemann, J.)

- Section/Rule/Keywords: Bankr. Rule 9011

- Summary: A law firm entered into an agreement with the debtor, whereby it was paid $775 to represent the debtor both before and after his chapter 7 bankruptcy

case was filed. The "limited representation agreement" between the debtor and the law firm provided that the law firm would not sign the petition, attend the meeting of creditors with the debtor, or perform some of the other minimal duties required of attorneys representing debtors. The chapter 7 trustee objected to the law firm's attempt to limit its services in this fashion and sought to recover the attorneys' fees paid by the debtor. The bankruptcy court observed that the Florida Rules of Professional Conduct do allow law firms to unbundle their legal services under some circumstances. However, Local Rule 9011-1 of the bankruptcy court for the Middle District of Florida requires that, unless an attorney is allowed to withdraw from a case by order of a court, the counsel filing a petition on behalf of a debtor "shall attend all hearings scheduled in the case or proceeding at which the debtor is required to attend." The bankruptcy court found that the limited representation agreement was inconsistent with the duties imposed by the bankruptcy court and ordered the law firm to pay Mr. Ruiz' filing fee of $335 and return the balance of the fees directly to the debtor.

Gebhardt v. Palmer

515 B.R. 369 (Bankr. M.D. Fla. Sept, 8, 2014) (Glenn, J.)

- Section/Rule/Keywords: 11 U.S.C. § 110, bankruptcy preparer

- Summary: The U.S. trustee filed motions for sanctions, contempt and a complaint seeking injunctive relief against two bankruptcy preparers. Following hearings on the motions and the complaint, the bankruptcy court ordered the tax preparers to disgorge their fees, and enjoined them from acting as bankruptcy petition preparers. The court found that they had violated prior court orders and had unlawfully provided legal advice regarding the form of bankruptcy to file, bankruptcy procedures, and the dischargeability of certain debts. The bankruptcy preparers were fined and enjoined from preparing bankruptcy petitions.

Kapila v. SunTrust Mortgage (In re Pearlman)

---B.R.---, 2014 WL 4799547 (Bankr. M.D. Fla. Sept. 26, 2014) (Jennemann, J.)

- Section/Rule/Keywords: 11 U.S.C. § 544, 11 U.S.C. § 548, Fla. Stat. § 726.105, fraudulent transfer, single satisfaction

- Summary The chapter 11 trustee of four consolidated debtors filed an adversary proceeding against a bank to recover payments made by one of the consolidated debtors to the bank on mortgages on properties owned by a non-debtor. Crudele, the owner of the real property that was subject to the mortgages, was an active participant in the Lou Pearlman Ponzi scheme. Some of the payments were used to satisfy the mortgage indebtedness on a property located in Illinois. Less than a year later, Crudele sold the Illinois property and deposited all of the proceeds from the sale (amounting to more than double the amount of the alleged fraudulent transfers) into the account of one of the consolidated debtors. The two remaining transfers were paid to the bank and applied toward Crudele's note and mortgage encumbering a Florida property. Crudele sold the Florida property and acquired another property. That property was sold and Crudele then deposited an amount (more than double the amount of the alleged fraudulent transfers) into one of the consolidated debtor's bank accounts. The court found that pursuant to § 550(d) the Trustee is entitled to only a single satisfaction. This is known as the "single satisfaction rule". Since the funds transferred from the debtors with respect to the Illinois property were repaid prior to the bankruptcy, the bank was protected from liability pursuant to the single satisfaction rule. With respect to the payments made on the mortgage of the Florida property, the court found that issues of fact remained as to whether the funds had been repaid, so as to absolve the bank from liability under the single satisfaction rule or whether other equitable considerations absolved SunTrust from liability.

In re Summerville

---B.R.---, 2014 WL 4723588 (Bankr. M.D. Fla. Sept. 16, 2014) (Glenn, J.)

- Section/Rule/Keywords: 11 U.S.C. § 707(b), presumption of abuse

- Summary: A chapter 13 debtor's case was dismissed for failure to make payments under the confirmed plan. Prior to dismissal the debtor filed a notice of conversion from Chapter 13 to Chapter 7. The question before the court was whether § 707(b) applies only to cases that are initially filed under chapter 7 or whether they also apply to cases that were filed under a different chapter and converted to chapter 7. The court found that § 707(b)(2) does apply to converted cases and therefore dismissed the bankruptcy case.

In re Gaynor

Slip Copy, 2014 WL 4435429 (Bankr. M.D. Fla. Sept. 5, 2014) (Jennemann, J.)

- Section/Rule/Keywords: 11 U.S.C. § 506

- Summary: Debtor sought to strip off a junior lien encumbering his home in bankruptcy. The debtor, however, had conveyed the home, encumbered by a first and second mortgage, to a land trust years prior to the bankruptcy filing. The bankruptcy court determined that if a debtor has an equitable right to redeem real property, the debtor may use 11 U.S.C. § 506 to avoid a lien on the property. Accordingly, the court set a final evidentiary hearing to allow the debtor an opportunity to establish that it had such an equitable interest.

In re Berkman

Slip Copy, 2014 WL 4823833 (Bankr. M.D. Fla. Sept. 29, 2014) (Delano, J.)

- Section/Rule/Keywords: Bankr. Rule 9019, Fla. Stat. § 726.101 *et. seq.*, fraudulent transfer

- Summary: The debtor, the orchestrator of an elaborate Ponzi scheme, entered into a settlement agreement with the chapter 7 trustee of his involuntary bankruptcy case. The trustee had filed objections to various exemption claims and filed an adversary proceeding against the debtor seeking to avoid and recover transfers of assets. A settlement agreement called for the debtor to pay more than $4.5 million to the trustee in exchange for the abatement and eventual dismissal of the pending litigation. Following the filing of a motion pursuant to Fed. R. Bankr. P. 9019, the bankruptcy court approved the settlement. After the final payments were made under the settlement agreement, the trustee wound up the bankruptcy case and funds were distributed to creditors. The trustee was then sued by a post-bankruptcy creditor of the debtor claiming that it had been defrauded by the debtor and that the transfers made by the debtor to the trustee were fraudulent transfers under the FUFTA. The issues before the court were whether the trustee had, by virtue of the settlement and release of claims against the debtor and his company, given the debtor a reasonably equivalent value in exchange for the payments and had acted in good faith. The court found that the trustee had made a diligent inquiry into the source of the funds and had settled significant claims against the debtor and thereby established both elements of her affirmative defense.

In re Estate of Juanita Jackson v. General Electric Capital

---B.R.---, 2014 WL 4495067 (Bankr. M.D. Fla. Sept. 12, 2014) (Williamson, J.)

- Section/Rule/Keywords: attorney client privilege

- Summary: A law firm represented a number of affiliated companies on a variety of matters, some with respect to a corporate restructuring, and others regarding litigation. A bankruptcy trustee for one of the entities came into possession of certain communications relating to the defense of lawsuits because the debtor was one of the co-clients of the law firm in that litigation. The trustee then sought to obtain other privileged documents from the law firm and the affiliated entities. The bankruptcy court ruled that the co-client exception to the attorney client privilege did not entitle the trustee of the bankrupt subsidiary to demand disclosure of attorney client communications between the law firm and the parent company on matters unrelated to their common representation, and the trustee was not entitled to share privileged documents with any third party that would destroy co-client privilege.

In re Estate of Juanita Jackson v. General Electric Capital

---B.R.---, 2014 WL 4702583 (Bankr. M.D. Fla. Sept. 20, 2014) (Williamson, J.)

- Section/Rule/Keywords: attorney client privilege

- Summary: Chapter 7 trustee obtained documents relating to the defense of the debtor's subsidiary in certain negligence actions under the co-client exception to the attorney client privilege during discovery. The trustee then desired to use those documents at trial. The receiver for the corporate parent, not a party to the proceeding, objected to the use of the documents, saying it would unilaterally waive the attorney client privilege. After reviewing the documents *in camera*, the court determined that many of the documents in question were, in fact, not privileged. The court also observed that the trustee needed to use the documents and he could not obtain the substantial equivalent of them without undue hardship. The court ruled that the documents could be used at the trial but the use would not constitute a waiver of the attorney client privilege or work product doctrine in any subsequent action or proceeding and that neither the documents, nor their contents, could be used outside of the proceedings absent further order of the court.

In re White

Slip Copy, 2014 WL 4443422 (Bankr. M.D. Fla. Sept. 3, 2014) (Funk, J.)

- Section/Rule/Keywords: 11 U.S.C. § 362(d), automatic stay

- Summary: A creditor filed for relief from the bankruptcy stay alleging that the debtors had filed four chapter 13 petitions since September of 2010 and that the court had dismissed their first three cases for failure to make payments. The creditor claimed that the debtor's prior petitions and failure to make payments demonstrated a lack of good faith entitling creditor to relief from the bankruptcy stay. The court denied the motion finding that the creditor did not present sufficient evidence of the prior bankruptcy filings. The court also found that the creditor had failed to present any documentary evidence to establish that creditor had a secured claim against the debtor's property.

In re Duval at Gulf Harbors, LLC

---B.R.---, 2014 WL 4748080 (Bankr. M.D. Fla. Sept. 18, 2014) (Williamson, J.)

- Section/Rule/Keywords: 11 U.S.C. § 362, 21 U.S.C. § 853, automatic stay

- Summary: A grand jury returned an indictment against the debtor and the district court entered a preliminary order of forfeiture. The debtor failed to follow the procedures necessary to challenge the forfeiture. In May of 2014, the debtor filed his bankruptcy petition. In July, the district court entered a final order of forfeiture. The debtor asserted that the final order of forfeiture violated the automatic bankruptcy stay, because it was entered after the filing of the bankruptcy. The bankruptcy court denied the debtor's request to set aside the forfeiture asserting that the petitioner must follow the specified procedures established by Congress and may not commence a separate action against the United States concerning the validity of the interest in the forfeited property, citing 21 U.S.C. § 853(k).

In re Garner

---B.R.---, 2014 WL 4387542 (Bankr. M.D. Fla. Sept. 4, 2014) (Jennemann, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523, collateral estoppel

- Summary: Plaintiff, the State of Texas, filed suit in Texas state court against the debtor and his businesses alleging various violations of the Texas Deceptive Practices and Consumer Protection Act and the Texas Consumer Debt Management Services Act. The debtor then filed for chapter 7 relief and the plaintiff filed a complaint seeking a determination that the debtor's liability for fraud under the aforementioned statutes should be accepted as proof of nondischargeability under § 523 of the Code. The bankruptcy court abated the adversary proceeding and allowed the plaintiff to proceed to judgment in the state court. However, the judgment was based upon agreed stipulations between the plaintiff and the chapter 7 trustee, not the debtor. Plaintiff then filed a motion for summary judgment relying on the collateral estoppel effect of the state court's final judgment and findings of fact to establish non-dischargeability. The plaintiff properly served debtor with the adversary complaint but debtor completely failed to respond to plaintiff's complaint. The bankruptcy court, while reluctant to grant collateral estoppel effect to the state court judgment, determined that the debtor, by failing to answer the factual averments set forth in the adversary complaint had admitted those allegations. By virtue of the allegations contained in the complaint the plaintiff had established all the elements necessary to establish its non-dischargeability claim under § 523(a) and a judgment of non-dischargeability was entered against the debtor.